TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, [redacted] 1920

No. [redacted]282

THE DISTRICT OF COLUMBIA, PETITIONER,

vs.

R. P. ANDREWS PAPER COMPANY.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

PETITION FOR CERTIORARI FILED MARCH 16, 1920.

CERTIORARI AND RETURN FILED MAY 11, 1920.

(27,560)

(27,560)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1919.

No. 805.

THE DISTRICT OF COLUMBIA, PETITIONER,

vs.

R. P. ANDREWS PAPER COMPANY.

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

INDEX.

	Original.	Print.
Caption	1	1
Transcript from supreme court of the District of Columbia	1	1
Caption	1	1
Declaration	1	1
Bill of particulars	2	2
Agreed statement of facts	3	3
Permit to repair or reconstruct buildings	10	10
Special applications for projections beyond the building line	12	13
Application for permit to repair or reconstruct buildings	14	14
Letter of Engineer Commissioner	15	16
Pleas	16	16
Trial by jury waived and case submitted to jury on agreed statement of facts; judgment on verdict ordered, judgment	17	17
Appeal noted	17	17
Memorandum: Appeal bond approved and filed	17	17
Assignment of errors	17	17
Designation of record	18	18
Clerk's certificate	18	19
Minute entry of argument	20	20
Opinion	21	20
Judgment	26	23
Clerk's certificate	27	23
Writ of certiorari and return	28	25

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., MARCH 20, 1920.

1 Court of Appeals of the District of Columbia.

No. 3267.

R. P. Andrews Paper Co., a Corporation, Appellant,

vs.

District of Columbia.

Supreme Court of the District of Columbia.

At Law. No. 61175.

District of Columbia, Plaintiff,

vs.

R. P. Andrews Paper Co., a Corporation, Defendant.

United States of America,
District of Columbia, ss:

Be it remembered, that in the Supreme Court of the District of Columbia, at the City of Washington, in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had, in the above entitled cause, to wit:

Declaration.

Filed April 2, 1918.

In the Supreme Court of the District of Columbia.

At Law. No. 61175.

District of Columbia

vs.

R. P. Andrews Paper Co. a Corporation.

1. The plaintiff, the District of Columbia, a municipal corporation, sues the defendant, R. P. Andrews Paper Co., a corporation, in an action of assumpsit for money due the plaintiff for the rental of vaults built under the public highways of the District of Co-
2 lumbia connected with the premises of the defendant at number 727-31 13th Street, Northwest, in the city of Washington, used and occupied by the defendant in its business for the sale of retail dry goods, in the sum of One hundred and twenty-four dol-

lars and thirty-six cents ($124.36), for a period from September 1, 1916 to June 30, 1918; and the plaintiff claims the sum of $124.36 with interest thereon from the 30th day of November, 1916, together with costs.

2. The plaintiff sues the defendant for other money payable by the defendant to the plaintiff for goods sold and delivered by the plaintiff to the defendant; and for work done and materials provided by the plaintiff for the defendant at its request; and for money lent by the plaintiff to the defendant; and for money paid by the plaintiff for the defendant at its request; and for money received by the defendant for the use of the plaintiff; and for money found to be due from the defendant to the plaintiff on accounts stated between them. And the plaintiff claims $124.36; with interest from the 30th day of November, 1916, according to the particulars of demand hereto annexed.

CONRAD H. SYME,
F. H. S.,
F. H. STEPHENS,
Attorneys for Plaintiff.

2M—10-8-'17. R. 3889-18.

Rent of Vault Space from July 1, 1917, to June 30, 1918, Inc.

Payable at the Office of the Collector of Taxes, D. C., July 1, 1917.

Folio —.

Name of User, R. P. Andrews Paper Co.
Location of Vault, 727-731 13th Street.

To the District of Columbia, Dr.

Square.	Lot.	Value of vault space	Amount of rent.
288	47	$12,064	$60.32
To all of rent.....			$60.32

Received payment.

——— ———,
Collector of Taxes, D. C.,
By ——— ———.

Made by M.
Compared by C. A. M.

3 Office of the Assessor, D. C.

Rent of Vault Space from September 1, 1916, to June 30, 1917, Inc.

Payable at the Office of the Collector of Taxes, D. C., November 1, 1916.

Folio —.

Name of User, R. P. Andrews Paper Co.
Location of Vault, 727-729 13th Street.

To the District of Columbia, Dr.

Square.	Lot.	Value of vault space.	Amount of rent.
288	47	$15,370	$ 64.04
To all of rent			$64.04

Received payment.

——— ———,
Collector of Taxes, D. C.,
By —— ——.

Made by M.
Compared by C. A. M.

Agreed Statement of Facts.

* * * * * * *

It is hereby stipulated by the parties to the above cause, by their respective attorneys, that the same shall be submitted to the court for its judgment, subject to the right of either party to appeal therefrom, upon the statement of facts hereto annexed, with like effect as if the said statement of facts were the finding of a verdict of a jury in the cause, the actual impaneling of a jury therein being hereby waived.

CONRAD H. SYME,
F. H. S.,
F. H. STEPHENS,
Attorneys for Plaintiff.

M. D. ROSENBERG,
E. HILTON JACKSON,
Attorneys for Defendant.

Agreed Statement of Facts.

Section 7 of the Act of Congress, making appropriations for the District of Columbia, approved September 1st, 1916, (33 St. 716, sec. 7) provides:

"That hereafter the Commissioners of the District of Columbia are authorized and directed to assess and collect rent from all
4 users of space under the sidewalks and streets in the District of Columbia, which said space is occupied or used in connection with the business of said users."

On October 17th, 1791, George Washington, then President of the United States, promulgated in the building regulations the following:

"No vaults shall be permitted under the streets, nor any encroachments on the footway above" * * * "without the consent of the Commissioners."

On May 26th, 1845, the corporation of the City of Washington passed certain regulations in regard to the building of vaults under the public highways, which contained, among other things, the following:

"Every person, before proceeding to excavate, or causing to be excavated, any vault or area, shall obtain from the Mayor written permission therefor."

See Webb's Digest, pages 387, et seq.

The City of Washington passed an act on January 2d, 1864, entitled "An Act for vaulting under streets and avenues." Section two of that Act prescribes, among other things:

"And before obtaining permission to construct or make such vault, and previous to the commencement thereof the person so applying shall forthwith deposit in the usual depository of this City, to the credit of the ward fund in which it is located, the sum of Fifty cents for each square foot of ground mentioned, or required for such vault beyond the curb line, under a penalty of not less than Thirty nor more than Forty Dollars."

(Laws of the City of Washington, 61st Council, Chapter 23.)

On August 19th, 1872, the Board of Public Works, under the authority of Section thirty-seven (37) of the Act of Congress, approved February 21st, 1871, enacted a regulation as follows:

"Sec. 12. Vaults may be made not beyond the inner line of the pavement curb, to be securely covered with substantial flagging, or arched with hard brick, the crown of the arch to be at least twelve inches below the established surface of the footway; and any opening in the top of the vault shall be adjoining to or near the curbstone, and have a suitable iron grating or covering placed therein and no grating or other fixture shall project above or be sunk below the established graduation of the pavement."

No charges were prescribed by said Board for the installation or use of such vaults.

On January 1st, 1877, the Board of Commissioners of the District of Columbia adopted certain building regulations, among which was Section 34, which prescribed as a fee "for each permit for vault, $2 per linear foot of proposed vault.

Section fifteen (15) of those regulations prescribes that:

"Vaults shall be securely covered with substantial flagging, or

arched with hard brick. The crown of the arch shall be at least six inches below the established surface of the footway; and any openings in the top of the vault shall be at the inner edge of the extreme wall, and have a suitable covering placed thereon; no iron grate or other fixture shall project above or be sunk below the established grade of the pavement; and the outer wall of the vault must be at least four feet within the inner line of the curb. No vault shall be constructed so as to interfere with any sewer, waterpipe, manhole, gas pipe, tree or other public work, or improvement."

On August 23, 1878, the Commissioners revised the building regulations, retaining, unchanged, Sections fifteen (15) and thirty-four (34), above referred to.

On June 3d, 1882, the Commissioners again revised the building regulations. No change was made in the phraseology or fee respecting vaults, except to add that "vaults on business streets where there is no interference with lamps, trees or other public works, may be built with the outer face of wall at the inner face of the curb."

On November 1st, 1887, the building regulations were again revised and in thus relating to vaults therein, provided "for each permit for vault, $.03 per cubic foot of proposed vault."

On November 1st, 1889, the Commissioners made another revision of the building regulations, but made no change in the phraseology of the regulations in relation to vaults, or in the amount of fees therefor.

On June 26th, 1891, the Commissioners made another revision of the building regulations, fixed the fee "for each vault permit, $.15 per cubic foot of proposed vault." Section nine (9) thereof prescribed that "no vaults or areas will be permitted except by special permit, approved by all of the Commissioners and the Secretary of War."

On October 23d, 1891, the Commissioners adopted a "schedule of limitations and provisions relative to the projection of portions of building beyond the building line, as a basis for the Commissioners' concurrence under the Act of March 3d, 1891." In this schedule was the following provision:

"The area occupied shall be paid for at the rate of fifteen cents per cubic foot. Pavements over vaults must be constructed at the expense or risk of owner or owners of abutting property."

On July 25th, 1892, it was ordered "that the paragraph relating to the rate to be paid for the occupation of vaults, in the schedule of limitations and provisions relative to the projection of portions of the buildings beyond the building line, as set forth in the Building Regulations of the District of Columbia, is hereby amended to read as follows: 'The area occupied shall be paid for at the rate of fifteen cents per cubic foot in front of business houses and ten cents per cubic foot in front of dwellings. Pavements over vaults must be constructed at the expense or risk of the owner of abutting property.'"

In the building regulations adopted December 1st, 1892, in Section nine (9), under the caption, "Vaults under Pavements," is the following:

"Vaults in front of business property, the area shall be charged at the rate of fifteen cents per cubic foot, and in front of dwellings at the rate of ten cents per cubic foot, nor shall permit be issued until plan is submitted and approved, showing openings.

6 Pavements over vaults must be constructed at the expense or risk of owner or owners of abutting property."

Section eight (8) of those regulations likewise fixes a fee for vaults, as follows:

"For each permit for vault, fifteen cents per cubic foot of proposed vault in front of business property, and ten cents per cubic foot in front of dwellings."

The building regulations adopted July 31st, 1897, contained the following provision:

"No charge will be made for the occupancy of public space by vaults or areas, except the usual permit fee, and all permits for such occupancy are subject to revocation by the Commissioners at any time without compensation. No permit for vault or area shall be issued until there is submitted and approved plans showing the location and dimensions of the vault or area, and all openings pertaining thereto."

On February 20th, 1900, the Commissioners passed the following order, defining conditions under which permits for vaults would be issued:

"Ordered: This permit is accepted on condition that the District of Columbia has the right at any time to construct under, over or through said vault space, water pipes, gas pipes, sewers, conduits or other pipes or underground construction that the Commissioners of said District may deem necessary to be placed in the space occupied by the vault, without compensation.

And it is further agreed that in accepting this permit that the owner or owners, their heirs, executors, administrators, or assigns, immediately upon notice from the Commissioners of the District of Columbia that the water pipes, gas pipes, sewers, conduits or other pipes, or underground construction, are to be introduced in the space occupied by the vault, shall commence to move and forthwith remove, if necessary, any boiler, pipe, wall beam, machinery or construction in or pertaining to said vault, or any fixture or other thing therein, without cost to said District, so as to leave a space clear and sufficient in the judgment of said Commissioners for the introduction and maintenance of any underground construction from time to time deemed necessary by said Commissioners. And said Commissioners reserve the right to enter upon the premises at any time for the inspection and proper maintenance or repair of any work constructed by the District. In case the street roadway or sidewalk is widened, the vault shall be changed to correspond therewith, without expense to the District of Columbia, as directed by the Commissioners of said District. And this permit is accepted with the understanding that the occupation of the vault space is permitted merely as an accommodation to the owner of the abutting premises and that no right, title of interest of the public is in any way waived

or abridged thereby, except as expressed in said permit and the conditions aforesaid."

The building regulations adopted on February 27th, 1902, contained the following, among others: Sec. 123. * * *

"Par. 2. Plans must be submitted, with an application on an official blank, showing the location and dimensions of the vault and all openings; also the depth and proposed construction; and the vault must be built in accordance with the approved plans.

"Par. 3. The application for a vault must be accompanied by a written agreement, upon an official blank, signed by the owner of the abutting property and in terms of Section 124, contracting to release and relinquish the vault space, and to remove, free of expense to the District, all machinery, fixtures, or structural parts of the vault when so ordered by the Commissioners, or needed for public uses." * * *

(Building Regulations of February 27th, 1902, Continued.)

"Whenever the grade is changed, the vault must be changed and repaved, at the expense of the owner of abutting property, to comply with the new grades."

* * * * * * *

No Charge for Occupation of Space.

Par. 9. "No charge will be made for the occupancy of public space by vaults or areas, except the usual permit fee, and all permits for such occupancy are subject to revocation by the Commissioners at any time without compensation, when the vault space is needed for public use or improvements.

"No vaults shall be constructed so as to interfere with any sewer, water pipe, manhole, gas pipe, tree, or other public work or improvement, nor with any electric conduit carrying fire-alarm or police wires."

* * * * * * *

"In case the street, roadway or sidewalk is widened, the vault shall be changed to correspond therewith, without expense to the District of Columbia, as directed by the Commissioners of said District. And this permit is accepted with the understanding that the occupation of the vault space is permitted merely as an accommodation to the owner of the abutting premises and that no right, title or interest of the public — in any way waived or abridged thereby, except as expressed in said permit and the conditions aforesaid. And I herewith submit a statement of the proposed and intended uses of the vault, and a list of all machinery and fixtures that will be placed therein, subject to

the limitations of Section 123, and I further agree to use the vault for the purposes authorized by the Commissioners, and for no other purposes, under the terms of this section and agreement, and subject to the penalties for non-compliance as provided in section 195 of the Building Regulations of the District of Columbia."

The building regulations adopted October 18th, 1909, contained, among others, the following:—Sec. 123*a*. * * *

"Par. 3. The application for a vault must be accompanied by a written agreement, upon an official blank, signed by the owner of the abutting property and in terms of Section 124, contracting
8 to release and relinquish the vault space, and to remove, free of expense to the District, all machinery, fixtures, or structural parts of the vault when so ordered by the Commissioners or needed for public uses."

No charges for vaults were made, except $1.00 for permit to construct the vault. The permit issued was similar to the one provided for in the order of February 20, 1900, before quoted.

The building regulations adopted January 18th, 1913, in force on September 1, 1916, contain various provisions in respect to the construction of vaults, but made no charge therefor, except for the usual permit fee of $1.00. Sec. 123*a* and 124.

The permit issued was the same, with the following addition, which also appears in the revisions of 1902 and 1909:

"And I herewith submit a statement of the proposed and intended uses of the vault, and a list of all machinery and fixtures that will be placed therein, subject to the limitations of section 123, and I further agree to use the vault for the purpose authorized by the Commissioners and for no other purposes, under the terms of this section and agreement, and subject to the penalties for non-compliance as provided in section 182 of the Building Regulations for the District of Columbia.

____ ____,
____ ____,
____ ____,
"Owners of Abutting Property."

The Act of September 1st, 1916, entitled "An Act making appropriations to provide for the expenses of the Government of the District of Columbia for the fiscal year ending June 30th, 1917, and for other purposes," contained, among others, the following provision:

"Sec. 7. That hereafter the Commissioners of the District of Columbia are authorized and directed to assess and collect rent from all users of space occupied under the sidewalks and streets in the District of Columbia, which said space is occupied or used in connection with the business of said users."

On October 6th, 1916, the Commissioners of the District of Columbia promulgated the following order:

"That, in connection with the legislation contained in Section 7 of the District of Columbia Appropriation Act, approved September 1st, 1916, namely:

'That hereafter the Commissioners of the District of Columbia are authorized and directed to assess and collect rent from all users of space occupied under the sidewalks and streets in the District of Columbia, which said space is occupied or used in connection with the business of said users.' "It is hereby ordered:

That rentals shall be paid in advance on the first day of November of each year. For the first year the rental shall be paid from and including September 1st, 1916, the date of the approval of the said appropriation act, to November 1st, 1917.

The amount of rental to be charged and collected in each case shall be based on the area of the vault space multiplied by the assessed value per square foot of the adjoining land, multiplied by
9 one-half of one per cent; the minimum rental in any case to be $5.00 per annum.

The Auditor of the District shall include in the next deficiency estimates an item of $2,000 for the employment of a field party and for necessary incidental expenses in making surveys and computations relative to vault privileges granted in public space.

The Assessor shall immediately prepare printed schedules upon which the data necessary at this time to impose vault rentals may be furnished; the printed schedules to be turned over by the Assessor to the Major and Superintendent of Police for distribution by the several police captains among the users of vault space, who shall furnish, under oath, the information called for therein. The required information when collected by the several police captains shall be returned, through the Major and Superintendent of Police, to the Assessor for the preparation of cards upon which the bills for rental for the first payment from September 1st, 1916, to November 1st, 1917, shall be based.

The Auditor of the District shall set aside from the miscellaneous allotment of the general appropriation for contingent expenses of District offices a sufficient amount to cover the cost of printing the schedules referred to in the preceding paragraph.

The necessary accounts in connection with vault rentals shall be kept in the Assessor's Office, and all bills shall be prepared and delivered by that office."

The above order was amended on October 20th, 1916, as follows:

"That the order of October 6th, 1916, which provides that vault rentals shall be paid in advance on the first day of November of each year, the payment for the first year to include the period from September 1st, 1916, to November 1st, 1917, is hereby amended to read as follows:

"That the rentals shall be paid in advance on the first day of July for each year.

"For the first year the rental shall be paid from and including September 1st, 1916, the date of the approval of the District of Co-

lumbia Act of the fiscal year ending June 30th, 1917, to and including June 30th, 1918.

"The rental for vault space shall be paid within thirty days after the presentation of the bill."

The vaults, for which rental is sought in this case, are built under the public sidewalks, connected with the adjoining premises, and used by the defendant in his business. The rental charged for the vaults is a fair and reasonable one, if it be a legal charge.

The defendant has complied with all the building regulations in respect to the construction and maintenance of the vaults.

The Act of September first, 1916, and the order of the Commissioners pursuant thereto of October 6, 1916, affect the following classes:

a. The owner of premises adjoining the vault who is the user of the vault and built the same for which rent is charged in this case. The vault was constructed pursuant to a permit, a copy of which is attached hereto and made part hereof.

10 *b.* The tenant of premises adjoining the vault for which rent is charged who is the user of the vault, and constructed the same at his own expense, pursuant to a permit, a copy of which is attached hereto and made a part hereof.

c. The tenant of the premises adjoining the vault for which rent is charged who is the user of it; but did not construct the same; but the same was constructed by the owner under a permit from the District, a copy of which is filed herewith.

The defendant herein belongs to class "*c*," as above set forth.

The parties hereto reserve the right to further stipulate as to any material fact concerning the issues in this case at any stage of the cause.

Form 582 E. D.—4M—3-6-15 R. 9244 15.

6 No. 451.

Permit to Repair or Reconstruct Buildings.

Office of Inspector of Buildings.

District of Columbia.

Projections beyond the building line allowed as per plans approved and on file in the office of the Inspector of Bldgs.

Washington, July 27, 1912.

This is to certify, that James Sharp has permission to build vault, show windows, marquises, as per plan (It is a condition of this permit that the Office of the Superintendent of Sewers be notified the

day before work is commenced under this permit.) lot 42 square 288 No. 727-731 13th in accordance with application No. 451 on file in this office, and subject to the provisions of the Building Regulations of the District of Columbia.

The right is reserved to examine the building as often as may be necessary while in course of reconstruction, and order any change in the work that may be deemed requisite to insure sufficient strength, solidity, and safety from fire.

It is a condition of this permit that the office of the Inspector of Buildings be notified the day before work is commenced on reinforced concrete under the permit.

By Order of the Commissioners, D. C.

MORRIS HACKER,
Inspector of Buildings.

Fee paid, $6.

(Over.)

Extracts from Regulations.

No building or other structure, awning, sign, engine, steam or hot water boiler, furnace, machinery, bay window, show window,
11 tower or other projection shall be erected, nor any area, vault, cellar, basement, or excavation appertaining to a building or other structure to be made, nor alterations allowed in any such improvement, unless a permit for such alteration or improvement shall have been issued; and such permit shall be valid and in force for such period in each case not exceeding six (6) months, as the Inspector of Buildings shall determine. See Section 18.

Sec. 145. Persons engaged in the erection, reconstruction, or repair of any buildings may occupy the public space with building materials for such reasonable period as the Inspector of Buildings shall decide, to be specified on permits issued by him, subject to the conditions stated in these regulations. Building materials must be stored on private property until needed at the building under erection or repair.

Sec. 146. The occupation of sidewalks or roadways by articles not intended for immediate use in connection with the operations for which the permit has been issued will not be allowed.

The maximum area permitted to be occupied shall not extend beyond one-third of the width of the roadway on streets where there are no railway tracks. On streets containing railway tracks the space to be occupied outside of the curb shall depend on width of roadway in front of building under construction or repair.

Sec. 147. When considered necessary by the Inspector of Buildings, the space allotted for materials may extend laterally in the roadway twenty feet on each side of the lot on which the building is being erected.

Sec. 148. Materials deposited outside of the parking line must be securely and compactly ar-anged within the allotted space.

Sec. 149. A width of not less than six feet must be kept clear on the sidewalk. No material or rubbish to be placed within two feet of any tree.

Sec. 150. Materials outside of the building line must be placed and arranged as the Inspector of Buildings may direct, and all materials and rubbish shall be removed promptly by the contractor or owner of the property when so directed by the Inspector of Buildings. No gutter shall be obstructed except by temporary damming for collecting water for building purposes, when there are no other available means therefor, under such conditions as the Inspector of Buildings may prescribe. Any shed or temporary structure erected wholly or partly on any public highway under permit issued by the Inspector of Buildings shall be removed within such time as said Inspector shall direct, under a penalty for failure as prescribed in Section 182 of these regulations.

Sec. 151. Each builder or owner occupying the roadway or sidewalk with materials shall exhibit a red light at night, placed in such a manner as to warn the public of the obstruction of the roadway and sidewalk and so as to show distinctly the clear passageway left in the road and sidewalk. When the space occupied by the materials extends for twenty or more feet along the curb, at least one light shall be exhibited at each end of the obstruction, hung clear of the obstruction on the side adjoining the carriageway.

12 Sec. 152. Lime, cement or other mortar and concrete may be prepared upon the parking or roadway within the space above designated to be occupied by building material. If prepared upon roadways improved by concrete, asphalt, or bituminous pavements, it must be upon a tight bed of tongued and grooved boards, placed upon two-inch bearers or sleepers, leaving an air space below, and properly protected so as to prevent any splashing or dripping on the sidewalk, parking or roadway. The distance that mortar beds and building materials may extend from the curb into the street shall be noted on permit.

Sec. 153. The dressing of material on the streets or sidewalks is prohibited, but, by special permit stones, brick, or other material may be dressed within the parking line if suitably inclosed by tight fencing. Old building material may be cleaned under special permits from the Inspector of Buildings.

Sec. 154. Earth taken from excavations and rubbish taken from buildings must not be stored either upon the sidewalks, roadways, or alleys, but must be removed from day to day. Where dry rubbish apt to produce dust is handled, it must be kept wet, or otherwise covered to prevent its being blown about by the wind.

All sidewalks in front of buildings in course of erection must be protected securely against materials falling from the structure or scaffolding, as prescribed in Section 156.

No change shall be made in the limits or outline of any parking or terrace; nor shall any parking fence or terrace be moved, con-

structed, altered, or modified, except in accordance with plans presented to and approved by the Engineer Commissioner.

By order of the Commissioners, D. C.

MORRIS HACKER,
Inspector of Buildings.

Form 512—2M—11-15-17. R. 5365-18.

Fill Out Application in Copying Ink.

Special Applications for Projections Beyond the Building Line.

Washington, D. C., July 18, 1912.

To the Hon. Commissioners, District of Columbia.

GENTLEMEN: I hereby apply for a permit to construct the following projections beyond the building line, in accordance with the drawing hereunto annexed, to building on lot 12 square 288 to be known as No. 727-729-731 13th St., N. W.

Number of buildings one. Width of fronts 59′ 0″ each.

What is the height of the present terrace or parking above curb —.

Is any change proposed in this height of terrace or parking —.

13

No.	Description.	Projection.	Width.	Remarks.
	Areas			
	Balconies			
	Bay windows			
	Colonnades			
	Corner-tower			
2	Marquise	6′ 0″	10′ 6″	
	Oriel window			
	Porte cochere			
	Porch, open			
1	Porch, covered	3′ 0″	30′ 0″	
2	Show-windows	3′ 0″	6′ 0″	
	Steps to main entrance			
	Steps to basement			
1	Vault	29′ 1″ x 2′	0″ 59′ 0″	13th St.
	Manure pit			

Very respectfully,

JAMES SHARP, *Owner.*
Per P. F. GORMLEY CO., *Agent.*

Address Union Trust Bldg.

Widths.
13th St., N. W.
Street, 110.
Roadway, 40.
Sidewalk, 35.
Parking, —.

[Endorsed:] 6. No. 105191. Engineer Dept. D. C. Application for Building Projection. Owner, James Sharp. Location, 727-31 13th St., N. W. (1st indorsement.) ——, 19—. 451. ——, Inspector of Buildings, D. C. July 18, 1912. Electrical Engineer. Electrical Department. Approved July 18, 1912. Walter C. Allen, Electrical Engineer. R. G. W. S. G. W., Jr., Supt. of Sewers. July 19, 1912. Mr. Wepley.

Memorandum.

E. D.

July 22, 1912.

Respectfully forwarded to Major E. M. Markham, Corps of Engineers, U. S. A. Asst. to the Engineer Commissioner D. C., with report that proposed vault will not interfere with existing underground constructions of record.

J. B. GORDEN,
Acting Supt. of Sewers.

G. J. R. W.

Charge for Inspection Approved July 22, 1912.

14 2d Endorsement.

July 22, 1912.

Respectfully returned to Major E. M. Markham, Assistant to the Engineer Commissioner, D. C. with the report that vault projection will not interfere with street tree interests at this location if constructed in accordance with the enclosed plans.

Supt. Trees and Parkings.
T. LANHAM,
Inspr. of Buildings.

1.—3001.

July 22, 1912.

July 26, 1912.

This application complies with the regulations governing projections as established by concurrent action of the Commissioners, and is, therefore, approved by direction of the Commissioners.

MORRIS HACKER,
Inspector of Buildings.

Form 588—2M—11-20-'18. R. 4699-19.
No. brick required — M. Permit No. 451.

Application for Permit to Repair or Reconstruct Buildings.

Washington, D. C., July 27, 1912.

To the Inspector of Buildings:

The Undersigned owner hereby applies for a permit to make repairs in conformity with the Building Regulations.

1. Owner's name James Sharp.
2. House number 727-731 13th Street N. W.
3. Nearest intersecting street H north.
4. Number of lot 42, square 288.
5. Architect's name Milburn, Heister & Co.
6. Contractor's name P. F. Gormley Company.

Description of the Building.

7. How many buildings to be repaired one. Material of house brick. Roof slag.
8. No. of stories in height five. Width of front 59′ 0″. No. of feet deep 87′ & 100′.
9. How is the building to be occupied? mercantile. If a dwelling, how many families?
10. Will the building be wired for Electric lighting, heating or power? Yes.
11. After alteration, will the building conform in every respect with the requirements of the building law? Yes.
12. Collector's receipt for above deposit, No. 28652. Date June 14, 1912. Amount $59.00.
13. What is the estimated cost of the improvements? Cost included in building permit.

Personally appeared before me this — day of ——, A. D. 191–, —— ——, who, being duly sworn, deposes and says that the estimated cost of alteration and repairs contemplated in the attached application for permit is true.

——— ———,
Notary Public, D. C.

Description of Proposed Improvements.

Give definite particulars of just what repairs or improvements are contemplated.

Build vault under sidewalk, show windows, marquises, etc., as shown on plans filed with application for projection.
E. D. 105191.
Plumbing as approved 6/24/12.
Recommended for permit July 27, 1912.

A. R. McGONEGAL,
Inspector of Plumbing.

Application must be signed by owner of property and approved by Inspector of Plumbing.

Signature for Owner, James Sharp.
By Applicant, P. F. Gormley Company.
Address, Union Trust Bldg.

[Endorsed:] Permit No. 451. Application for Permit for Repairs, Alterations, &c. Owner James Sharp. Location Street 727-731 13th St., N. W. Lot 42 Square 288. Permit granted July 27, 1912.

Form 551 E. D.—7-5-'11—2M 271-12.

Office of the Engineer Commissioner of the District of Columbia.

Washington, July 30, 1912.

This permit is accepted on condition that the District of Columbia has the right at any time to construct under, over or through said vault space, water pipes, gas pipes, sewers, conduits or other pipes or underground construction that the Commissioners of said District
16 may deem necessary to be placed in the space occupied by the vault, without compensation.

And it is further agreed that in accepting this permit that the owner or owners, their heirs, executors, administrators or assigns, immediately upon notice from the Commissioners of the District of Columbia that the water pipes, gas pipes, sewers, conduits or other pipes or underground construction, are to be introduced in the space occupied by the vault, shall commence to move, and forthwith remove, if necessary, any boiler, pipe, wall, beam, machinery or construction in or pertaining to said vault, or any fixture or other thing therein, without cost to said District, so as to leave a space near and sufficient in the judgment of said Commissioners for the introduction and maintenance of any underground construction from time to time deemed necessary by said Commissioners. And said Commissioners reserve the right to enter upon the premises at any time for the inspection and proper maintenance or repair of any work constructed by the District. In case the street, roadway or sidewalk is widened, the vault shall be changed to correspond therewith, without expense to the District of Columbia, as directed by the Commissioners of said District. And this permit is accepted with the understanding that the occupation of the vault space is permitted merely as an accommodation to the owner of the abutting premises and that no right, title or interest of the public is in any way waived or abridged thereby, except as expressed in said permit and the conditions aforesaid.

Owner, JAMES SHARP.

Witness:
P. C. JONES.

Pleas.

Filed April 3, 1918.

* * * * * * *

The defendant for pleas to the declaration filed herein and to each and every count thereof says:

1. It never undertook and promised as therein alleged.
2. It is not indebted as therein alleged.

M. D. ROSENBERG,
E. HILTON JACKSON,
Attorneys for Defendant.

Supreme Court of the District of Columbia.

Friday, February 28th, 1919.

Before Judge Hitz.

Session resumed pursuant to adjournment. Hon. Wendell P. Stafford, Justice presiding.

* * * * * * *

17 Now comes the plaintiff by its attorneys Conrad H. Syme, and Francis H. Stephens, and the defendant by its attorneys, Maurice D. Rosenberg and E. Hilton Jackson, and waive trial by jury herein and submit this cause to the Court on the agreed statement of facts filed herein, and after consideration thereof, the Court finds from said facts in favor of the plaintiff for the sum of One Hundred and Twenty-four Dollars and thirty-six cents ($124.36) with interest thereon from the 30th day of November 1916. Thereupon, defendant waiving the time within which to file a motion for a new trial, judgment on verdict is ordered. Wherefore, it is considered that the plaintiff recover herein against the defendant the sum of One Hundred Twenty-four and 36/100 Dollars, ($124.36), with interest thereon from the 30th day of November, 1916, together with costs of suit to be taxed by the clerk and have execution.

From the foregoing judgment, the defendant by its said attorneys, in open court, notes an appeal to the Court of Appeals; whereupon the penalty of a bond for costs, is hereby fixed in the sum of One Hundred Dollars.

Memorandum.

March 7, 1919.—Appeal Bond approved and filed.

Assignment of Errors.

Filed April 1, 1919.

* * * * * * *

1. The court erred in not holding that the erection of the vault herein was pursuant to and in compliance with the express terms of the permit and thereby constituted a vested property right in the defendant.

2. The court erred in not holding that this vested property right may not be disturbed except in the exercise of the police power, which exercise was not attempted by the plaintiff.

3. The court erred in rendering the judgment herein in that the said judgment, if enforced, impairs the obligation of an existing con-

tract forbidden by Article 1, Section 10, of the Constitution of the United States.

4. The court erred in not holding that the Act of September 1, 1916, and the regulations issued pursuant thereto, upon which the plaintiff's suit was based, were unconstitutional and void as being in conflict with Article 1, Section 10, of the Constitution of the United States, prohibiting the impairment of the obligation of contract.

5. The court erred in not holding that said Article 1, Section 10, is as binding upon the District of Columbia as upon the States.

6. The court erred in not holding that said Act of September 1, 1916, and the regulations pursuant thereto, are void because they constitute a discrimination against the rights of the defendant.

18 7. The court erred in not holding that said Act of Congress of September 1, 1916, on its face is so indefinite as to the character, amount and manner of assessing and collecting the rent therein contemplated as to render the same invalid and incapable of being rendered valid by the subsequent regulations of the District Commissioners as herein contemplated.

8. The court erred in holding that said Act of September 1, 1916, may be regarded as a repeal of the prior regulations of said District Commissioners, pursuant to which the vault herein was constructed.

9. The court erred in not holding that said Act of September 1, 1916, is retrospective and retroactive in its character and therefore inoperative and void.

10. The court erred in not holding that the word "thereafter" in said Act of September 1, 1916, gives such statute a prospective operation only and therefore such statute cannot operate to fix the liability of the plaintiff in the case at bar.

M. D. ROSENBERG.
E. HILTON JACKSON.
Attorneys for Defendant.

Service of copy acknowledged.

F. H. STEPHENS.

4/1/19.

Designation of Record.

Filed April 1, 1919.

* * * * * * *

1. Declaration, exhibits and agreed statement of facts thereto annexed.

2. The pleas of the defendant herein filed.

3. The judgment of the court.

4. The assignment of error.

M. D. ROSENBERG,
E. HILTON JACKSON,
Attorneys for Defendant.

Service of copy acknowledged.

F. H. STEPHENS.

4/4/19.

Supreme Court of the District of Columbia.

UNITED STATES OF AMERICA,
District of Columbia, ss:

I, John R. Young, Clerk of the Supreme Court of the District of Columbia, hereby certify the foregoing pages numbered from 1 to 20, both inclusive, to be a true and correct transcript of the record,
19 according to directions of counsel herein filed, copy of which is made part of this transcript in cause No. 61175 at Law, wherein District of Columbia is Plaintiff and R. P. Andrews Paper Co., a corporation, is Defendant, as the same remains upon the files and of record in said Court.

In testimony whereof, I hereunto subscribe my name and affix the seal of said Court, at the City of Washington, in said District, this 15th day of April, 1919.

[Seal Supreme Court of the District of Columbia.]

JOHN R. YOUNG,
Clerk.
By W. E. WILLIAMS,
Assistant Clerk.

Endorsed on cover: District of Columbia Supreme Court. No. 3267. R. P. Andrews Paper Co., a corporation, appellant, vs. District of Columbia. Court of Appeals, District of Columbia. Filed Apr. 19, 1919. Henry W. Hodges, clerk.

20 Tuesday, December 2nd, A. D. 1919.

No. 3267.

R. P. ANDREWS PAPER CO., a Corporation, Appellant,

vs.

DISTRICT OF COLUMBIA.

No. 3268.

SAKS & COMPANY, a Corporation, Appellant,

vs.

DISTRICT OF COLUMBIA.

No. 3269.

ABRAHAM LISNER, Appellant,

vs.

DISTRICT OF COLUMBIA.

The argument in the above entitled causes was commenced by Mr. M. D. Rosenberg, attorney for the appellants, and was continued by Mr. F. H. Stephens, attorney for the appellee, and was concluded by Mr. E. Hilton Jackson, attorney for the appellants.

21 In the Court of Appeals of the District of Columbia.

No. 3267.

R. P. ANDREWS PAPER CO., a Corporation, Appellant,

vs.

DISTRICT OF COLUMBIA, Appellee.

Opinion.

Opinion of the Court per Mr. Justice Robb.

This is an appeal from a judgment of the appellee, plaintiff below, in an action to recover rent for space under the sidewalk adjacent to appellant's store building in this City.

The facts, as agreed upon by the parties, are substantially as follows: On October 17, 1791, there was promulgated under the direction of President Washington, a building regulation providing that no vaults should be permitted under the streets without the consent of the Commissioners, and thereafter such permission was

sought and obtained under regulations requiring the payment of what in effect was a permit fee by the applicant, but no other charge was prescribed. As early as 1897 the regulations specifically provided that no charge would be made for the occupancy of such public space under sidewalks, "except the usual permit fee." On July 27, 1912, when the permit to construct the vault occupied by appellant was issued to appellant's lessor, the building regulations contained the following provisions: "No charge will be made for the occupancy of public space by vaults or areas, except the usual permit fee, and all permits for such occupancy are subject to revocation by the Commissioners at any time without compensation when the vault space is needed for public use or improvements." This paragraph became Section 123c in the revised Building Regulations of 1913, and was headed "No Charge For Occupation Of Space." The regula-
22 tions further in effect provided that, upon notice from the Commissioners of the District that the vault space was required for certain specified public purposes, the owners would vacate so much of such space as in the judgment of the Commissioners should be necessary. The regulations further provided that the form of the agreement to be signed by the applicant should contain the following: "And this permit is accepted with the understanding that the occupation of the vault space is permitted merely as an accommodation to the owner of the abutting premises, and that no right, title or interest of the public is in any way waived or abridged thereby, except as expressed in said permit and the conditions aforesaid." These provisions became Section 124 of said revision of 1913. The permit here involved contained a provision that it was issued "subject to the provisions of the building regulations of the District of Columbia."

It thus appears that from 1791 to 1897 permits were issued upon the payment of a permit fee. From 1897 down to and including the date when the permit here involved was issued, the building regulations specifically provided that no charge would be made for the occupancy of vault space, "except the usual permit fee."

Section 7 of the Act of September 1, 1916, (39 Stat. 716), provided "that hereafter the Commissioners of the District of Columbia are authorized and directed to assess and collect rent from all users of space occupied under the sidewalks and streets in the District of Columbia, which said space is occupied or used in connection with the business of said users." Regulations looking to the enforcement of this statute were promulgated by the Commissioners, and this suit was brought to enforce the collection of rent for the vault
23 space occupied by appellant under the permit heretofore mentioned. It is the contention of the District that appellant's rights are to be measured by the provision in the regulations in force when the permit was issued, namely, that "no right, title, or interest of the public is in any way waived or abridged", and hence that appellant is a mere licensee, subject to the will or pleasure of the Commissioners. Appellant, on the other hand, contends that as its permit was issued subject to the provisions of the building regulations, all the provisions of those regulations must be considered

in determining the rights of appellant; that one of those conditions was that no charge would be made, other than the usual permit fee; that, having constructed the vault upon conditions set forth in the regulations, which specifically were made applicable by the permit, appellant obtained a valuable right, of which it may not be deprived summarily; that Congress must be presumed to have intended the preservation of vested interests, and therefore that the statute of 1916 must be given a prospective interpretation.

In 3 Dillon on Mun. Cor., 5th Ed., Sec. 1178, the learned author says: "In many cities lot proprietors upon streets are permitted or not forbidden to make openings in the sidewalks, in order to obtain an entrance into the basement or cellar. It is also the usage that owners of buildings may make openings under the sidewalk or street to obtain additional cellar room." In Gregsten vs. Chicago, 145 Ill. 451, the court ruled that "it is the general doctrine that municipalities, under the power of exclusive control of their streets, may allow any use of them consistent with the public objects for which they may be held"; that "a city under special legislative authority, as well as its general powers, may grant permits for
24 and regulate the building of vaults under the streets, alleys and sidewalks, and require such compensation for the privilege as it may deem reasonable and just, when such permits relate solely to such use of the alleys, etc., as is in nowise inconsistent with their use by the public, and such permit when accepted and acted on by the holder by making costly improvements required will constitute a contract between the City and such holder irrevocable at the mere will of the City." In Tacoma Safety Deposit Co. vs. Chicago, 247 Ill. 192, the court reaffirmed the doctrine that where contractual relations exist between the city and the occupant of vault space, the rights of the occupant may not be abridged summarily. In the Minor Privilege Cases, 131 Md. 600, the municipality attempted to revoke all permits for the occupation of public space, including awnings, areaways, vaults, etc., the real purpose, as the court found, being to require the holder of such permits to make annual payments for the privileges enjoyed. The court, after an exhaustive examination of the question, ruled that this might not be done; that the attempted revocation was not in the exercise of police power, but primarily to obtain revenue. The court said: "No one would expend any considerable sum of money for the ornamentation of his property and benefit of his business, and pay for the privilege, if he supposed that it could be taken from him the next day, month or year, unless he paid such additional sum as that or some other Board exact of him." See also Babbage vs. Powers, 130, N. Y. 281.

In the present case there is no contention that the space occupied by appellant is needed for public purposes, nor is it charged that appellant has failed to comply with any condition affixed to its
25 permit. Every occupant of public space under such permits is subject, of course, to all reasonable police regulations, and, if the space occupied by him is required by the public, his interest instantly must yield to that of the public. These conditions materially affect the value of the privilege enjoyed. The provision in

the Act of 1916 is in no sense a police measure, its sole purpose being to provide revenue. It must be assumed that in the enactment of this provision Congress intended to preserve vested interests. The vault in question having been erected upon condition that no charge would be made for use of the space occupied, we are of the view that Congress did not intend to abridge the right of appellant by the enactment of this statute. The provision relied upon by the District, to the effect that no right, title or interest of the public is in any way waived or abridged, is followed by the words "except as expressed in said permit and the conditions aforesaid"; and those conditions, as we have seen, mean that, while no charge will be exacted for the occupancy of such public space, the rights of the public are paramount, and upon a proper showing of public necessity the occupation of the space must be restricted or terminated. We rule, therefore, that the statute in question was intended to apply and does apply only to permits thereafter issued.

The judgment is reversed with costs and case remanded for further proceedings.

Reversed and Remanded.

Mr. Chief Justice Smyth dissents.

26 January Term, 1920.

No. 3267.

R. P. Andrews Paper Co., a Corporation, Appellant,

vs.

District of Columbia.

Appeal from the Supreme Court of the District of Columbia.

Monday, March 1st, A. D. 1920.

This cause came on to be heard on the transcript of the record from the Supreme Court of the District of Columbia and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said Supreme Court in this cause be and the same is hereby reversed with costs; and that this cause be and the same is hereby remanded to the said Supreme Court for further proceedings.

Per Mr. Justice ROBB.

March 1, 1920.

Mr. Chief Justice Smyth dissents.

27 Court of Appeals of the District of Columbia.

I, Henry W. Hodges, Clerk of the Court of Appeals of the District of Columbia, do hereby certify that the foregoing printed and type-

written pages numbered from 1 to 26, inclusive, constitute a true copy of the transcript of record and proceedings of said Court of Appeals in the case of R. P. Andrews Paper Co., a Corporation, Appellant, vs. District of Columbia, No. 3267, January Term, 1920, as the same remain upon the files and records of said Court of Appeals.

In testimony whereof I hereunto subscribe my name and affix the seal of said Court of Appeals, at the City of Washington, this 16th day of March, A. D. 1920.

[Seal Court of Appeals, District of Columbia, 1893.]

HENRY W. HODGES,
Clerk of the Court of Appeals of the District of Columbia.

UNITED STATES OF AMERICA, *ss:*

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the Honorable the Judges of the Court of Appeals of the District of Columbia, Greeting:

Being informed that there is now pending before you a suit in which R. P. Andrews Paper Company is appellant, and The District of Columbia is appellee, No. 3267, which suit was removed into the said Court of Appeals by virtue of an appeal from the Supreme Court of the District of Columbia, and we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said Court of Appeals and removed into the Supreme Court of the United States, do hereby command you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, the sixth day of May, in the year of our Lord one thousand nine hundred and twenty.

JAMES D. MAHER,
Clerk of the Supreme Court of the United States.

[Endorsed:] 3267. File No. 27,560. Supreme Court of the United States, No. 805, October Term, 1919. The District of Columbia vs. R. P. Andrews Paper Company. Writ of Certiorari. Court of Appeals, District of Columbia. Filed May 7, 1920. Henry W. Hodges, Clerk.

In the Court of Appeals of the District of Columbia.

No. 3267.

DISTRICT OF COLUMBIA, Appellee,

v.

R. P. ANDREWS PAPER COMPANY, Appellant.

It is hereby agreed between counsel for the appellant and the appellee respectively, in the above entitled cause that a certified transcript of the record on file in this Court may be taken as a return to the writ of certiorari from the Supreme Court of the United States.

E. HILTON JACKSON,
Attorney for Appellant.
F. H. STEPHENS,
Attorney for Appellee.

Endorsed: No. 3267. District of Columbia, Appellee, v. R. P. Andrews Paper Co., Appellant. Stipulation allowing record to be taken as returns to the writ of certiorari. Court of Appeals, District of Columbia. Filed May 10, 1920. Henry W. Hodges, Clerk.

I, Henry W. Hodges, Clerk of the Court of Appeals of the District of Columbia, do hereby certify, in obedience to the writ of certiorari hereto attached and returned herewith, the foregoing to be a true and correct copy of the stipulation of counsel filed in said cause on the 10th day of May, A. D. 1920.

In Testimony Whereof, I hereunto subscribe my name and affix the seal of said Court at the City of Washington, District of Columbia, this 10th day of May, A. D. 1920.

[Seal Court of Appeals, District of Columbia, 1893.]

HENRY W. HODGES,
Clerk.

[Endorsed:] File No. 27,560. Supreme Court U. S., October Term, 1919. Term No. 805. District of Columbia, Petitioner, vs. R. P. Andrews Paper Co. Writ of Certiorari and Return. Filed May 11, 1920.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1919.

No. 808.

DISTRICT OF COLUMBIA, PETITIONER,

vs.

R. P. ANDREWS PAPER COMPANY, A CORPORATION, RESPONDENT.

PETITION FOR WRIT OF CERTIORARI.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Now comes the District of Columbia by its Commissioners, Louis Brownlow and Charles W. Kutz, and shows to the court as follows:

1. That the act of Congress of September 1, 1916 (39 Statutes, 716), provided (sec. 7), "That hereafter the Commissioners of the District of Columbia are authorized and directed to assess and collect rent from all users of space occupied under the sidewalks and streets in the District of Columbia, which said space is occupied or used in connection with the business of said users" (Record, Ct. of App. D. C., No. 3267, p. 80).

2. That the respondent herein, the R. P. Andrews Paper Company, is a corporation, engaged in business at Numbers 727 to 731 Thirteenth street northwest, Washington, D. C., and uses a vault built under the sidewalk in front of said premises in connection with the business of the respondent, conducted on the premises.

3. That the said vault was constructed by one James Sharp under a permit issued by the District of Columbia on the 30th day of July, 1912, as follows:

> "This permit is accepted on condition that the District of Columbia has the right at any time to construct under, over or through said vault space, water pipes, gas pipes, sewers, conduits or other pipes or underground construction that the Commissioners of said District may deem necessary to be placed in the space occupied by the vault, without compensation.
>
> "And it is further agreed that in accepting this permit that the owner or owners, their heirs, executors, administrators or assigns, immediately upon notice from the Commissioners of the District of Columbia that the water pipes, gas pipes, sewers, conduits or other pipes, or underground construction, are to be introduced in the space occupied by the vault, shall commence to move, and forthwith remove, if necessary, any boiler, pipe, wall, beam, machinery or construction in or pertaining to said vault, or any fixture or other thing therein, without cost to said District, so as to leave a space near and sufficient in the judgment of said Commissioners for the introduction and maintenance of any underground construction from time to time deemed necessary by said Commissioners. And said Commissioners reserve the right to enter upon the premises at any time for the inspection and proper maintenance or repair of any work constructed by the District. In case the street, roadway or sidewalk is widened, the vault shall be changed to correspond therewith, without expense to the District of Columbia, as directed by the Commissioners of said District. And this permit is accepted with the understanding that the occupation of the vault space is

> permitted merely as an accommodation to the owner of the abutting premises and that no right, title, or interest of the public is in any way waived or abridged thereby, except as expressed in said permit and the conditions aforesaid." (Record, App. D. C., No 3267, pages 15, 16.)

This permit was issued at a time when under the building regulations there was no charge for such occupation of public space. The regualtions provided as follows (Record, C. of App. D. C., No. 3267, p. 7, par. 9):

> "No charge will be made for the occupancy of public space by vaults or areas, except the usual permit fee, and all permits for such occupancy are subject to revocation by the Commissioners at any time without compensation, when the vault space is needed for public use or improvements.
>
> "No vaults shall be constructed so as to interfere with any sewer, water pipe, manhole, gas pipe, tree, or other public work or improvement, nor with any electric conduit carrying fire-alarm or police wires."

The usual permit fee of $1.00 was charged the owner under the building regulations at the time this permit was issued (Record, C. of App., D. C., No. 3267, p. 8). There was no other compensation.

4. That pursuant to the said act of 1916, the Commissioners of the District of Columbia promulgated certain rules and regulations and established the rates to be paid for such vaults (Record, C. of App., No. 3267, pages 8, 9). It was agreed by the parties to this cause that the rentals charged for the use of such vaults were reasonable, if a legal charge (Record, C. of App., D. C., No. 3267, p. 9).

5. That the tenant then in possession of premises, the user of the vault, refused to pay such rental, and thereupon the District of Columbia brought an action of assumpsit in the Supreme Court of the District of Columbia and was given judgment against the R. P. Andrews Paper Company for

two years' rental—the sum of $124.36, with interest from the 30th day of November, 1916 (Record, App. D. C., No. 3267, p. 17). The case was tried upon an agreed statement of facts. The defendant appealed to the Court of Appeals of the District of Columbia, which reversed the judgment of the lower court, Chief Justice Smythe, dissenting.

6. It is a matter of common knowledge that the business section of Washington has been long established and that practically every business house in the city uses a vault under the sidewalk as an adjunct to its business. It follows under the decision of the Court of Appeals, which held the law to be prospective only in its operation, that none of these phases will ever pay anything as rental therefor. The incongruous situation will therefore arise of one merchant occupying vault space rent free, and his neighbor paying for that privilege. The decision also means the loss of considerable revenue to the District of Columbia. The most important phase of the matter, however, is the power of the Commissioners of the District to surrender, *in perpetuum*, without consideration and without express authority of Congress, the right to occupy the public highways of the city.

7. Your petitioner, therefore, prays that the writ of certiorari may issue out of this honorable court, directed to the said Court of Appeals, commanding said court to certify and send to this court at a time certain to be therein designated a full and complete transcript of all of the proceedings in said Court of Appeals in said case entitled therein No. 3267, R. P. Andrews Paper Company *vs.* the District of Columbia, to the end that said case may be reviewed and determined by this court, and that the said decision of the said Court of Appeals in said case, and every part thereof, may be reversed by this honorable court.

LOUIS BROWNLOW,
C. W. KUTZ,
Commissioners of the District of Columbia.

F. H. STEPHENS,
Attorney for Petitioner.

DISTRICT OF COLUMBIA, *ss:*

We, Louis Brownlow and Charles W. Kutz, Commissioners of the District of Columbia, do solemnly swear that we have read the foregoing and annexed petition by us subscribed, and know the contents thereof, and that the matters and things therein stated upon our personal knowledge are true, and those stated upon information and belief we believe to be true.

LOUIS BROWNLOW,
C. W. KUTZ,
Commissioners of the District of Columbia.

Subscribed and sworn to before me this 16th day of March, 1920.

WILLIAM TINDALL,
Notary Public, D. C.

BRIEF IN SUPPORT OF PETITION.

The majority opinion of the Court of Appeals proceeded upon the theory the District of Columbia had entered into the contract with the builder, James Sharp, for construction of the vault in question and the builder had thereby acquired the vested right which could not be disturbed either by the District or by Congress. The terms of the permit itself asserted "this permit is accepted with the understanding that the occupation of the vault space is permitted merely as an accommodation to the owner of the abutting premises and that no right, title, or interest of the public is in any way waived or abridged thereby, except as expressed in a certain permit and the conditions offered." This language negatives the idea of a contract and puts the builder in the position of a mere licensee; and such was the decision of the court in Tacoma Safety Deposit Company against Chicago, 247

Ill., 192 (31 L. R. A., 868, 869). In that case the question arose as to the power of the city to require the adjoining owners to pay compensation for the use of space beneath the sidewalk. The building was on the corner of two streets, where the fee in one of the streets was still in the owner of the abutting property and the fee of the other street was in the city. The court held that no compensation could be required for the occupation of vaults beneath the streets while the fee was in the owner, but could be required for vaults beneath the street while the fee was in the city. That a permit to build "did not estop the city afterwards from requiring the complainant to pay for the use of the city's property which its building in part occupied or to remove its building or the part thereof which rested upon the city's property. The complainant at most, we think, obtained a license to construct a subway beneath the sidewalk of the city adjoining its street, which license could be revoked by the city in case the complainant refused to comply with the ordinance which required it to pay to the city compensation for the use of the space beneath the sidewalk in the street which belonged to the city" (31 L. R. A., N. S., 873). This was one of the cases relied upon in the opinion of the majority of the Court of Appeals. The fee in the street in the present case is in the United States. It will be observed also that the supposed contract is without any consideration to the city. The regulation stated that no charge would be made "except the usual permit fee." It is obvious that this is not a consideration. If by any possibility it could be so viewed, it would be entirely inadequate.

Whether there was a contract between the city and the builder or not, certainly the builder acquired no vested rights in the highway. In 3 Dillon on Municipal Corporations, 5th edition, par. 1180, the author says that the presumption of assent on the part of the city to the erection of a vault is not a presumption of a grant of title or of a permanent right of the city, "as no power exists in the authorities to make such grant or to confer any such right" (citing De-

shong against New York, 176 N. Y., 475, 483), and the author further adds that "there is no absolute right in the owner to occupy the streets whether the fee is in the city or in the owner.

Had the Commissioners attempted by formal contract to grant the owner of the premises, for an adequate consideration, a perpetual easement in the streets of the city, they would have been without power to do so. The only authority the Commissioners have for making building regulations is found in the acts of June 14, 1878, 20 U. S. Stat., 131, as follows:

> "That the Commissioners of the District of Columbia be, and they hereby are, authorized and directed to make and enforce such rules and regulations relative to the sale of coal in the District of Columbia as shall insure full weight to purchasers of coal; also, such building regulations for the said District as they may deem advisable."

Neither this nor any other authority, general or special, confers upon the Commissioners any power to grant easement in the streets. On the contrary, the Revised Statutes of the District of Columbia, sec. 222, provides, "No open space, public reservation, or other public ground in the city of Washington or other portion of public streets or alleys in said city shall be occupied by any private person for any private purpose whatever." This has been the general policy of Congress and of the District, but has been relaxed in some particulars so as to permit the occupation of a portion of the sidewalk adjoining business property for the display of merchandise not necessary to be recounted here.

This court has repeatedly declared that it is not within the power of a municipality to convey *in perpetuum* franchises in public highways unless that power "be granted in express words."

A few illustrative excerpts from the opinion of this court will suffice.

This court in the case of District of Columbia *vs.* Bailey, 171 U. S., 161, after a very careful examination and review of the statutes, decided that the Commissioners of the District of Columbia had no power to submit a claim to a common-law arbitration, as this involved the power to make a contract with the obligation to pay money. The court said (page 174), referring to the act of June 11, 1878, which provided a permanent form of government for the District of Columbia (20 Stats., 103):

> "It was expressly enacted, however, in the same section (sec. 3) that the Commissioners, in the exercise of the duties and authority vested in them, 'shall make no contract nor incur any obligation other than such contracts and obligations as are hereinafter provided and shall be approved by Congress.'"

and on page 176:

> "The necessary operation of this provision of the statute is to cause the District Commissioners to be merely administrative officers with ministerial powers only. The sum of the municipal powers of the District of Columbia are neither vested in, nor exercised by, the District Commissioners. They are, on the contrary, vested in the Congress of the United States, which acts *pro hac vice* as the legislative body of the District, and the Commissioners of the District discharge the functions of administrative officials."

And such, it might be added, has been the consistent ruling of the Court of Appeals: Walter *vs.* MacFarland, 27 App., D. C., 182; power to narrow roadways: Coughlin *vs.* D. C., 25 App., 251; power to pass regulations for the removal of snow and ice from the sidewalks: Daly *vs.* MacFarland, 28 App., 552; revocation of plumber's license: Fay *vs.* MacFarland, 32 App., 295; alley condemnations: Berry *vs.* D. C., 32 App., 96; making exceptions to the building regulations: B. & O. *vs.* FitzGerald, fencing in of railroad tracks. In the last-named case (page 142) the court also said that "the priv-

ilege of a railroad company to lay its tracks along a city street is a mere license, revocable at the will of Congress."

The cases relied upon by the Court of Appeals were Tacoma Safety Deposit Company *vs.* Chicago, 247 Ill., 192; 31 L. R. A., 868, already referred to; Gregoten *vs.* Chicago, 145 Ill., 451; 36 Am. St., 496, which held in brief that a city might make, for a consideration, an irrevocable contract for the occupation of vaults, and that such permit cannot be revoked at will for the benefit of some other person who is said to be invested with a similar permit. Minor privilege cases, 131 Md., 600, in which the mayor was enjoined from revoking all minor privileges, such as vaults, porches, areas, etc., for the purpose of increasing the rental; and Babbage *vs.* Power, 130 N. Y., 281; 14 L. R. A., 398; 29 N. E., 132, which was a case for personal injuries, brought against the owner of the property because of the breaking of a flagstone in the sidewalk.

The court held that the possession of the vault for a long period of years with the acquiescence and knowledge of public officials raised the presumption of a permit.

In Citizens Railway *vs.* Detroit Railway, 171 U. S., 48, 53, 54, 55, the question was whether the city had granted an exclusive franchise in the streets. The court said:

> "The argument is strong, and all of its strength has been presented and is appreciated, but there exists considerations of countervailing and superior strenth. That such power must be given in language explicit and express, or necessarily to be implied from other powers, is now firmly fixed. There were many reasons which urged to this—reasons which flow from the nature of the municipal trust—even from the nature of the legislative trust, and those which, without the clearest intention explicitly declared—insistently forbid that the future should be committed and bound by the conditions of the present time, and functions delegated for public purposes be paralyzed in their exercise by the existence of exclusive privileges. The rule and the reason for

it are expressed in Minturn *vs.* Larue, 23 How., 435; Wright *vs.* Nagle, 101 U. S., 791; State *vs.* Cincinnati Gas Light and Coke Co., 18 Ohio St., 262; Parkhurst *vs.* Salem, 32 Pac. Rep., 304; Saginaw Gas Light Co. *vs.* Saginaw, 28 Fed. Rep., 529, decided by Mr. Justice Brown of this court; Long *vs.* Duluth, 51 N. W. Rep., 913. See also Grand Rapids Electric Light and Power Co. *vs.* Grand Rapids, &c., Co., 33 Fed. Rep., 659, opinion delivered by Mr. Justice Jackson at circuit. As bearing on the rule, see also Oregon Railway & Navigation Co. *vs.* Oregonian Railway Co., 130 U. S., 1; Central Transportation Co. *vs.* Pullman Palace Car. Co., 139 U. S., 24.

"The power, therefore, must be granted in express words or necessarily to be implied."

* * * * * * *

"Easements in the public streets for a limited time are different and have different consequences from those given in perpetuity. Those reserved from monopoly are different and have different consequences from those fixed in monopoly. Consequently those given in perpetuity and in monopoly must have for their authority explicit permission, or, if inferred from other powers, it is not enough that the authority is convenient to them, but it must be indispensable to them."

In Skaneateles Water Co. *vs.* Skaneateles, 184 U. S., 354, 363, the court said:

"There is no implied contract in an ordinary grant of a franchise, such as this, that the grantor will never do any act by which the value of the franchise granted may in the future be reduced. Such a contract would be altogether too far-reaching and important in its possible consequences in the way of limitation of the powers of a municipality, even in matters not immediately connected with water, to be left to implication. We thing none such arises from the facts detailed."

In Knoxville Water Co. *vs.* Knoxville, 189 U. S., 434, 436, 438, the question was in the power of the city to reduce water rates. The court said:

> "The trouble at the bottom of the company's case is that the supposed promise of the city on which it is founded does not exist. If such a promise had been intended it was far too important to be left to implication. In form the words of this part of the instrument are the words of the company alone. They occur in the part of the contract which sets forth the company's undertakings, not in the part devoted to the promises of the city or in that which contains the still later mutual agreements. See Georgia Railroad & Banking Co. *vs.* Smith, 128 U. S., 174; Ragan *vs.* Aiken, 9 Lea, 609. They are words of a company which was notified by the act which called it into being of the power expressly conferred upon the city 'by ordinance to regulate the price of water' which the company might supply."
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> "Some argument was attempted as to the ordinance impairing the obligation of the contracts between the company and its consumers. But such contracts, of course, were made by it, subject to whatever power the city possessed to modify rates. The company could not take away that power by making such contracts. New Orleans *vs.* New Orleans Water Works Co., 142 U. S., 79, 91, 92; Browne *vs.* Turner, 176 Massachusetts, 9, 15."

In City of Joplin *vs.* Southwest Missouri Light Co., 191 U. S., 150, the city had granted a franchise, under ordinance, to operate waterworks for twenty years. By a subsequent ordinance the city provided for an issue of bonds to build its own plant. The company brought injunction to restrain the city, on the ground that the obligation of the contract, its grant of franchise, had been impaired. The court said:

> "It is by implication from the statute and the ordinance passed under it, not from the explicit expres-

> sion of either, that the conclusion is deduced that the city is precluded from erecting its own lighting plant, and yet it is conceded that the grant to the appellee is not exclusive. * * * The limitation contended for is upon a governmental agency, and restraints upon that must not be readily implied. The appellee concedes, as we have seen, that it has no exclusive right, and yet contends for a limitation upon the city which might give it (the appellee) a practical monopoly. Others may not seek to compete with it, and if the city cannot, the city is left with a useless potentiality, while the appellee exercises and enjoys a practically exclusive right. There are presumptions, we repeat, against the granting of exclusive rights and against limitations upon the powers of government."

To the same effect are Bienville Water Supply Co. *vs.* Mobile, 175 U. S., 109; 186 U. S., 212; Walla Walla City *vs.* Walla Walla Water Co., 172 U. S., 1; Gas Co. *vs.* Hamilton, 146 U. S., 258, 261, 268; Water Co. *vs.* Knoxville, 200 U. S., 22, 33, contracts construed in favor of public.

The point must not be lost sight of that the power exercised in the present case of imposing rentals for the use of vaults under the public highways is the exercise of Congress and not an act of the municipal authorities. In the case of Sioux City Railway *vs.* Sioux City (138 U. S., 98; 106, 107), the railway company was required by ordinance to pay for paving between the tracks. The legislature required the company to pay for one foot outside of the tracks. It was assessed a special tax against this cost. The company claimed it was not compelled to pave any way except between the rails. The court held that "it was not in the power of the city, by any contract with the company, to deprive the legislature of the power of taxing the company" (page 107).

F. H. STEPHENS,
Attorney for Petitioners.

[redacted]

No. [redacted]

DISTRICT OF COLUMBIA

vs.

R. P. KINGSLAND, PAUL CO., A Corporation

No. [redacted]

DISTRICT OF COLUMBIA

vs.

[redacted] & COMPANY, A Corporation.

No. [redacted]

DISTRICT OF COLUMBIA

vs.

ABRAHAM LISNER

[redacted]

F. H. STEPHENS,
Corporation Counsel, D. C.,
Attorney for Petitioner.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1920.

No. 282.

DISTRICT OF COLUMBIA

vs.

R. P. ANDREWS PAPER CO., A CORPORATION.

No. 283.

DISTRICT OF COLUMBIA

vs.

SAKS & COMPANY, A CORPORATION.

No. 284.

DISTRICT OF COLUMBIA

vs.

ABRAHAM LISNER.

BRIEF ON BEHALF OF PETITIONER.

Statement.

The respondents are merchants doing business in the District of Columbia and use in connection with their business vaults constructed under the public highway adjacent to

1*y*

their premises. Under the act of September 1, 1916 (39 Stats., 716), Congress provided:

> "SEC. 7. That hereafter the Commissioners of the District of Columbia are authorized and directed to assess and collect rent from all users of space occupied under the sidewalks and streets in the District of Columbia, which said space is occupied or used in connection with the business of said users."

Under the authority thus conferred the Commissioners fixed a rental for the use of such space, which is conceded to be a reasonable rental, but which the several respondents refused to pay, and suit was accordingly brought by the District against them. The cases were tried upon an agreed statement of facts and resulted in each case in a judgment in favor of the District for the amount of rental claimed.

The vault used by the Andrews Paper Company was constructed under a permit obtained July 30, 1912 (R., No. 282, p. 10), and issued to the owner, James Sharp. The respondent is a tenant of Sharp's and the user of the vault.

Saks & Company are long-term tenants of the premises, and constructed the vaults used by them under the public highway under a permit dated September 25, 1884 (R., No. 283, p. 11).

Abraham Lisner is the owner of the premises adjacent to the vault under the public highway used by him, and constructed the vault under a permit dated January 9, 1914 (R., No. 284, p. 10).

It will be noticed by reference to the agreed statement of facts (R., No. 282, p. 3 *et seq.*) that the policy of the municipal authorities in regard to charging rental or fees for vault space varied from time to time. From 1791 down to 1864

there appears to have been no charge for vaults other than a nominal permit fee, if there were that. In 1864 the policy was changed and a charge of 50 cents a square foot was made (R., p. 4). When the regulations were revised in 1872 there was no charge for vaults. In 1877 the policy was again changed and the charge of $2.00 per linear foot was prescribed. This continued to be the policy of the Commissioners, and the same charge was made until 1887, when the fee was changed to 3 cents per cubic foot (R., p. 5). This charge continued until the revision of 1891, when the charge became 15 cents per cubic foot. This continued to be the charge for a year, and in 1892 it was modified to 15 cents per cubic foot in front of business houses and 10 cents per cubic foot in front of dwellings. This continued to be the charge until 1897, when the charge was abolished and no fee charged except "the usual permit fee."

The legislation of 1916, under review here, was the first time that an annual rent was imposed for vaults.

It thus appears that at the time the Andrews vault was constructed, 1912, and when the Lisner vault was constructed, 1914, there was no rental charge for vaults other than the usual permit fee. When the Saks vault was constructed in 1884, the charge prescribed was that under the regulations of 1877, $2.00 per linear foot. The frontage of the Saks property (R., 283, p. 11) was given as 43′ 6″. The charge thus would have been $87. The annual rental charge under the act of 1916 for this vault is $89.25 (R., 283, p. 2-3), for the first year and $98.63 for the second year. The value of the vault space is given by the assessor at $23,655 for the second year. The value of the Andrews vault is $15,370 and the annual rent at $64.04 (R., No. 282, p. 3). The value

of the Lisner vault is $120,672, and the annual rent $603,36 (R., No. 284, p. 3).

The permit in each case contains this stipulation, "and this permit is accepted with the understanding that the occupation of the vault space is permitted merely as an accommodation to the owner of the abutting premises and that no right, title, or interest of the public is in any way waived or abridged thereby, except as expressed in said permit and the conditions aforesaid" (R., 282, pp. 6, 7; R., 283, pp. 6, 7). There was also a provision in the building regulations, made a condition of the permit, that—

> "Par. 3. The application for a vault must be accompanied by a written agreement, upon an official blank, signed by the owner of the abutting property and in terms of section 124, contracting to release and relinquish the vault space, and to remove, free of expense to the District, all machinery, fixtures, or structural parts of the vault when so ordered by the Commissioners, or needed for public uses." * * *
>
> (See p. 7 of the record in each case.)

Assignment of Errors.

The petitioner assigns for error in these cases:

1. The ruling of the court below that there was a contract between the District of Columbia and the respective respondents which could not be impaired by an act of Congress. There was no contract, but a mere license to occupy public space subject to revocation by the Commissioners.

2. The ruling of the court below that the act under review applied only to vaults erected after the passage of the act.

3. The holding of the court below, in substance, that the respondents had been granted a perpetual license in public highways which could not be affected by the act in question.

ARGUMENT.

The argument in the court below, on behalf of the respondents, proceeded almost entirely upon the theory that the licensees had acquired a vested right to the use of such vaults, free of any charge for rent, for the reason that no rental or charge for the use of them was required at the time they were built, and that the issuance of a permit to build the vaults constituted a contract, the obligation of which could not be impaired even by act of Congress. This argument would not apply to Saks because, at the time his vaults were built, 1884, a fee of two dollars per linear front foot was charged under the regulations then in force. In view of the fact that the municipal authorities were very careful to surround the permits with conditions intended to prevent the very results which are claimed to flow from them, it would be surprising if the courts could or should find that the authorities had granted a perpetual easement to public space without any compensation therefor. When in each case the permits carried the conditions that they were "accepted with the understanding that the occupation of the vault space is permitted merely as an accommodation to the owner of the abutting premises, and that no right, title or interest of the public is in any way waived or abridged thereby, except as expressed in said permit and the conditions aforesaid"; and again, when, under paragraph 3, the licensees agreed to vacate the vaults "when so ordered by the Commissioners, or

needed for public uses," it was thought, and rightly so, and so held by the court below, that the interests of the public had been safely guarded. (R., No. 283, pp. 6, 7.)

If Andrews and Lisner have a vested right to the free use of public space and Saks has not, then we have the anomalous situation of a number of persons occupying public space for private purposes, for which some of them pay a reasonable charge and the others no charge. This, it is thought, might be a real discrimination, and not a fancied one, which has been argued by counsel for the respondents.

It has not been considered necessary on behalf of the District to follow the argument of the respondents in their discussion of vested rights or the impairment of the obligation of contracts. The cases cited are plainly not applicable to the present situation. Respondents assume that there has been a contract between them and the District; that the obligation of the contract has been impaired by the legislation in question; and that they have, therefore, been deprived of vested rights arising under the contract. The cases cited by them deal with pure contracts and with vested rights arising from them. The question here is whether there is a vested right at all, or any contract, the obligation of which has been impaired. They have assumed a vested right and built their argument upon this assumed right. As a matter of fact and law, no such right exists; neither a vested right nor a contract. Actually, they are mere licensees, accepting licenses on condition that they will quit when the Commissioners so order, under distinct notice, made a part of the permits, that "no right, title or interest of the public is in any way waived or abridged," and that their occupation of the public space is "merely as an accommodation" to the licensee. Notice, also,

that the license is granted without compensation, a consideration which figures largely in the case cited by respondents. How, under these circumstances, can it be argued with any force that they have a vested right to the public space occupied?

The Power of Municipal Authorities to Grant Perpetual Easements or Franchises in the Public Highways.

From a negative point of view it would seem that the municipality, the District of Columbia, is without authority to make the grant claimed by the respondents.

1. There is no grant of power to the municipality from which such a power could be directly or indirectly traced. This Court has repeatedly held the Commissioners are merely administrative officers and have no power to make contracts in the absence of legislation conferring such power. (D. C. *vs.* Bailey, 171 U. S., 161, 176, denying the power to the District to enter into a common-law arbitration, because of the lack of power to make contracts not "previously sanctioned by Congress or which they are authorized to make by express statutory authority.")

In a recent case the Court of Appeals held that the District had not the power to impose a fee for the inspection of elevators and hotels. Newman *vs.* Willard's Hotel Company, 47 App. D. C., 323.

2. In another case the Court of Appeals decided that the Commissioners had no power to pass ordinances upon a subject upon which Congress had legislated, although the legis-

lation had been declared by that Court to be invalid. Coughlin *vs.* D. C., 25 App., 251.

In view of the many instances in which Congress has granted franchises in the streets for street railroad and market purposes, it would seem that this particular power had been withdrawn, under the application of the decision in the above case, from the control or power of the Commissioners, conceding it to have once existed.

3. But passing this point, it is apparent that the District authorities have never, since the passage of the organic act of 1878, attempted to grant any franchise or any easement or license of a perpetual nature in the highways of the District. The absence of any attempt to exercise any such power and the absence of any grant of authority to the District, either direct or indirect, would seem to afford a fair basis for the assumption that it did not exist; and the presumption as to the power is against its existence, in the absence of clear and direct grant. D. C. *vs.* Bailey, 171 U. S., 161, 176.

4. The law involved in the present case is an act of Congress, not a municipal regulation. The licenses to the respondents arose under an ordinance. The power to make the ordinance had its source in Congress, which also had equal authority to revoke the power. This Congress did when it enacted the law which exacted a rental for the use of public space. The claim is, however, that the ordinance is superior to the act, a contention which was disposed of in Myers *vs.* D. C., 25 App. D. C., 132, 136.

Moreover, the fact that the fee of the streets is in the

United States, and not in the District, should not be lost sight of. If the fee of the streets were in the District, still the latter, in view of the exclusive power of legislation over the District vested in Congress, would not have the power to grant a franchise or perpetual easement or license in those streets, contrary to or in opposition to the will of Congress expressed in direct legislation, as in the law under discussion exacting the vault rental. Except, of course, in the instance that Congress had directed that very thing, in express terms, to be done. Where, however, the fee is not in the municipality, but in the sovereignty which created that municipality, the difficulties which confront the appellants in establishing as grant *in perpetuum* become insurmountable.

The claim of the respondents that they have a perpetual grant from the municipality, notwithstanding the expressed will of the sovereignty to the contrary, and in the absence of any grant, is not sustained by any principle or authority yet noted.

The Authorities.

Although the principles above enunciated would seem to be sufficiently clear without the need of illustration, decisions are not wanting upon the present issue.

Sioux City Railway *vs.* Sioux City, 138 U. S., 98, 106, 107: The city, by ordinance, required the company to pave between the tracks. The legislature required the company to pave one foot outside the tracks and assessed a special tax against it for this cost. The company claimed it was not compelled to pave anywhere except between the rails (p.

106). The Court held that "it was not in the power of the city by any contract with the company to deprive the legislature of the power of taxing the company" (p. 107).

Even if the charter were a contract, it might be amended by the legislature. Railway Company *vs.* Philadelphia, 101 U. S., 528, 537. In this case the charter of the company provided for a license fee of $30.00 for each car. The legislature increased this to $50.00, which increase was claimed to be a violation of the contract.

In Citizens Railway *vs.* Detroit Railway, 171 U. S., 48, 53, 54, 55, the question was whether the city had granted an exclusive franchise in the streets. The Court said:

> "The argument is strong, and all of its strength has been presented and is appreciated, but there exist considerations of countervailing and superior strength. That such power must be given in language explicit and express, or necessarily to be implied from other powers, is now firmly fixed. There were many reasons which urged to this—reasons which flow from the nature of the municipal trust—even from the nature of the legislative trust, and those which, without the clearest intention explicitly declared—insistently forbid that the future should be committed and bound by the conditions of the present time, and functions delegated for public purposes be paralyzed in their exercise by the existence of exclusive privileges. The rule and the reason for it are expressed in Minturn *vs.* Larue, 23 How., 435; Wright *vs.* Nagle, 101 U. S., 791; State *vs.* Cincinnati Gas Light and Coke Co., 18 Ohio St., 262; Parkhurst *vs.* Salem, 32 Pac. Rep., 304; Saginaw Gas Light Co. *vs.* Saginaw, 28 Fed. Rep., 529, decided by Mr. Justice Brown of this court; Long *vs.* Duluth, 51 N. W. Rep., 913. See also Grand Rapids Electric Light and Power Co. *vs.* Grand

Rapids, &c., Co., 33 Fed. Rep., 659, opinion delivered by Mr. Justice Jackson at circuit. As bearing on the rule, see also Oregon Railway & Navigation Co. *vs.* Oregonian Railway Co., 130 U. S., 1; Central Transportation Co. *vs.* Pullman Palace Car Co., 139 U. S., 24.

"The power, therefore, must be granted in express words or necessarily to be implied."

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"Easements in the public streets for a limited time are different and have different consequences from those given in perpetuity. Those reserved from monopoly are different and have different consequences from those fixed in monopoly. Consequently those given in perpetuity and in monopoly must have for their authority explicit permission, or, if inferred from other powers, it is not enough that the authority is convenient to them, but it must be indispensable to them."

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"There is no implied contract in an ordinary grant of a franchise, such as this, that the grantor will never do any act by which the value of the franchise granted may in the future be reduced. Such a contract would be altogether too far-reaching and important in its possible consequences in the way of limitation of the powers of a municipality, even in matters not immediately connected with water, to be left to implication. We think none such arises from the facts detailed."

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> "The trouble at the bottom of the company's case is that the supposed promise of the city on which it is founded does not exist. If such a promise had been intended it was far too important to be left to implication. In form the words of this part of the instrument are the words of the company alone. They occur in the part of the contract which sets forth the company's undertakings, not in the part devoted to the promises of the city or in that which contains the still later mutual agreements. See Georgia Railroad & Banking Co. *vs.* Smith, 128 U. S., 174; Ragan *vs.* Aiken, 9 Lea, 609. They are words of a company which was notified by the act which called it into being of the power expressly conferred upon the city 'by ordinance to regulate the price of water' which the company might supply."
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> "Some argument was attempted as to the ordinance impairing the obligation of the contracts between the company and its consumers. But such contracts, of course, were made by it, subject to whatever power the city possessed to modify rates. The company could not take away that power by making such contracts. New Orleans *vs.* New Orleans Water Works Co., 142 U. S., 79, 91, 92; Browne *vs.* Turner, 176 Massachusetts, 9, 15."

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ordinance the city provided for an issue of bonds to build its own plant. The company brought injunction to restrain the city, on the ground that the obligation of the contract, its grant of franchise, had been impaired. The Court said:

> "It is by implication from the statute and the ordinance passed under it, not from the explicit expression of either, that the conclusion is deduced that the city is precluded from erecting its own lighting plant, and yet it is conceded that the grant to the appellee is not exclusive. That is, it is conceded the city has not exhausted its power under the statute by the grant held by appellee, but may make another to some other person than the appellee. In other words, that the city may make a competitor to appellee, but cannot itself become such competitor. The strength of the argument urged to support the distinction is in the consideration that competition by the city would be more effective than competition by private persons or corporations—indeed, might be destructive. The city, it is further urged, could be indifferent to profits and could tax its competitor to compensate losses. But this is speculation and it may be opposed by speculation, and there are besides countervailing considerations. The limitation contended for is upon a governmental agency, and restraints upon that must not be readily implied. The appellee concedes, as we have seen, that it has no exclusive right, and yet contends for a limitation upon the city which might give it (the appellee) a practical monopoly. Others may not seek to compete with it, and if the city cannot, the city is left with a useless potentiality, while the appellee exercises and enjoys a practically exclusive right. There are presumptions, we repeat, against the granting of exclusive rights and against limitations upon the powers of government."

To the same effect are Bienville Water Supply Co. *vs.* Mobile, 175 U. S., 109; 186 U. S., 212; Walla Walla City *vs.* Walla Walla Water Co., 172 U. S., 1; Gas Co. *vs.* Hamilton, 146 U. S., 258, 261, 268; Water Co. *vs.* Knoxville, 200 U. S., 22, 33, contracts construed in favor of the public.

While the Court of Appeals has not decided any case bearing an analogy as close as those cited above from this Court, yet the expressions of the Court would indicate the same trend.

In Penn Bridge Co. *vs.* U. S., 29 App. D. C., 452, 457:

> "The government of the District of Columbia is simply an agency of the United States for conducting the affairs of its government in the Federal District, and this work on the Piney Branch creek bridge was of a public, and not of a private, character."

In D. C. *vs.* Capital Traction Co., 41 App. D. C., 115, 119, relating to free transfers, the Court said:

> "The argument that the charter of defendant amounts to a contract, the obligation of which may not be impaired, may be briefly considered. (1) In the first place, the prohibition of laws impairing the obligations of contracts applies to the States, and not to the United States. The prohibitions to the United States are those of the 5th amendment, that no person shall be deprived of property without due process of law, and that private property shall not be taken for public use without just compensation. The application of these will be considered later.
>
> "A contract between the United States and the defendant in error cannot be implied from the provision fixing a maximum rate merely. See Detroit United

R. Co. *vs.* Detroit, 229 U. S., 39, 44; 57 L. Ed., 1056, 1059; 33 Sup. Ct. Rep., 697, and cases there cited."

State Cases.

Tacoma Safety Dep. Co. *vs.* Chicago (247 Ill., 192), 31 L. R. A. (N. S.), 868: Suit to enjoin the enforcement of a municipal ordinance for vault rentals. The plaintiff had erected a large store fronting partly on La Salle Street, the fee of which was in the city, and partly on Madison Street, the fee of that part of which used for vaults was in the adjoining owner. The contention of the company was that the city, having given a permit to build the vaults, could not, by ordinance, afterwards exact a rental for their use; that the city was estopped; and also that the ordinance was discriminatory. The Court held that the city could exact a fee for the use of the vaults under La Salle Street when the fee was in the city; but not under Madison Street, where the fee was in the owner of the adjoining property; and that the owner could be required to vacate if the vault was needed for public purposes. The Court also held that the company had a mere license, and that there was no discrimination.

> "It is also urged that the city, having granted to the complainant a permit to construct its building upon its premises according to plans and specifications which provided for the construction of subways beneath the sidewalks adjoining its premises, is now estopped to deny the right of the complainant to maintain said subways upon the property of the city free of charge. It is too clear for argument, we think, that the city had the right to regulate the construction of complainant's building at the time it was erected; and the fact that it may, through

its building department, have approved certain building plans which were submitted to it by the complainant, and granted to it a permit to construct its building, we think obviously did not estop the city afterwards to require the complainant to pay for the use of the city's property which its building in part occupied, or to remove its building, or the part thereof which rested upon the city's property. The complainant, at most, we think, obtained a license to construct a subway beneath the sidewalk of the city adjoining its buildings, which license could be revoked by the city in case the complainant refused to comply with the ordinance which required it to pay to the city compensation for the use of the space beneath the sidewalk in the street which belonged to the city. We do not think the cases of Gridley *vs.* Bloomington, 68 Ill., 47; Gregsten *vs.* Chicago, and Chicago *vs.* Norton Mill Co., *supra*, are in conflict with this view. In each of those cases contractual relations were held to exist between the parties, which were binding upon them, while in this case the most that can be claimed by the complainant is that it was granted a permit by the city to erect its building. At the time it took out this permit, it had full knowledge of all the facts, and obviously was not misled by the city. The doctrine of estoppel, we think, has no application to the case at bar.

"It is finally urged the ordinance is unreasonable and discriminatory. We are unable to see that the ordinance is subject to attack for those reasons, but are of the opinion the criticisms made upon the ordinance in those particulars are hypercritical."

Judge Dillon was of the opinion (3 Dillon on Municipal Corporations, 5th edition, par. 1189), that the pre-

sumption of assent on the part of the city to the erection of a vault is not a presumption of a grant of title or of a permanent right of the city, "as no power exists in the authorities to make such grant or to confer any such right" (citing Dyshong *vs.* New York, 176 N. Y., 475, 483), and the author further adds "there is no absolute right in the owner to occupy the streets whether the fee is in the city or in the owner."

In Augusta *vs.* Burch, 26 L. R. A., 340 (Ga.), it was held that a city could not grant the right to erect and perpetually maintain awnings over the street.

In Eddy *vs.* Granger, 28 L. R. A., 517 (R. I.), it was held that a town or city could not grant the right to maintain a private drain in a highway so as to make the city liable to the owner for its cutting off. Nor can a city grant a right to maintain a standpipe in the street. Barrows *vs.* Sycamore, 25 L. R. A., 535 (Ill.); nor lease a portion of the street for huckster purposes, Schoff *vs.* St. Louis, 20 L. R. A., 783 (Mo.); and in this jurisdiction it has been decided that push-cart venders are on the streets merely by sufferance, Montz *vs.* D. C., 20 App., 568; and in Kansas City *vs.* E. Fifth Street Railway, 38 L. R. A., 218 (Mo.), it was held that the State was not estopped from revoking a street railway franchise granted by the city from the State.

It appears from the authorities quoted that the city has the power to impose a fee for the use of the vaults and may revoke the license in question at any time. Indeed, the latter proposition was admitted in the oral argument below and doubtless will be here. It could not well be denied in view of the express condition attached to the permit. If this power exist, then the licenses might have been revoked and the

respondents compelled to apply for new licenses carrying a rental under the law, and the proceedings would have been, concededly, regular. In other words, the authorities might have done indirectly what, as contended, they could not do directly. This proposition closely approximates a *reductio ad absurdum*, and is a concession of the issue.

It is respectfully submitted that the decision of the Court below was contrary to both principle and authority, and should be reversed.

F. H. STEPHENS,
Corporation Counsel,
Attorney for Petitioner.

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JAMES D. MA

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1920.

No. 282.

DISTRICT OF COLUMBIA

vs.

R. P. ANDREWS PAPER CO., A CORPORATION.

No. 283.

DISTRICT OF COLUMBIA

vs.

SAKS & COMPANY, A CORPORATION.

No. 284.

DISTRICT OF COLUMBIA

vs.

ABRAHAM LISNER.

BRIEF FOR RESPONDENTS.

M. D. ROSENBERG,
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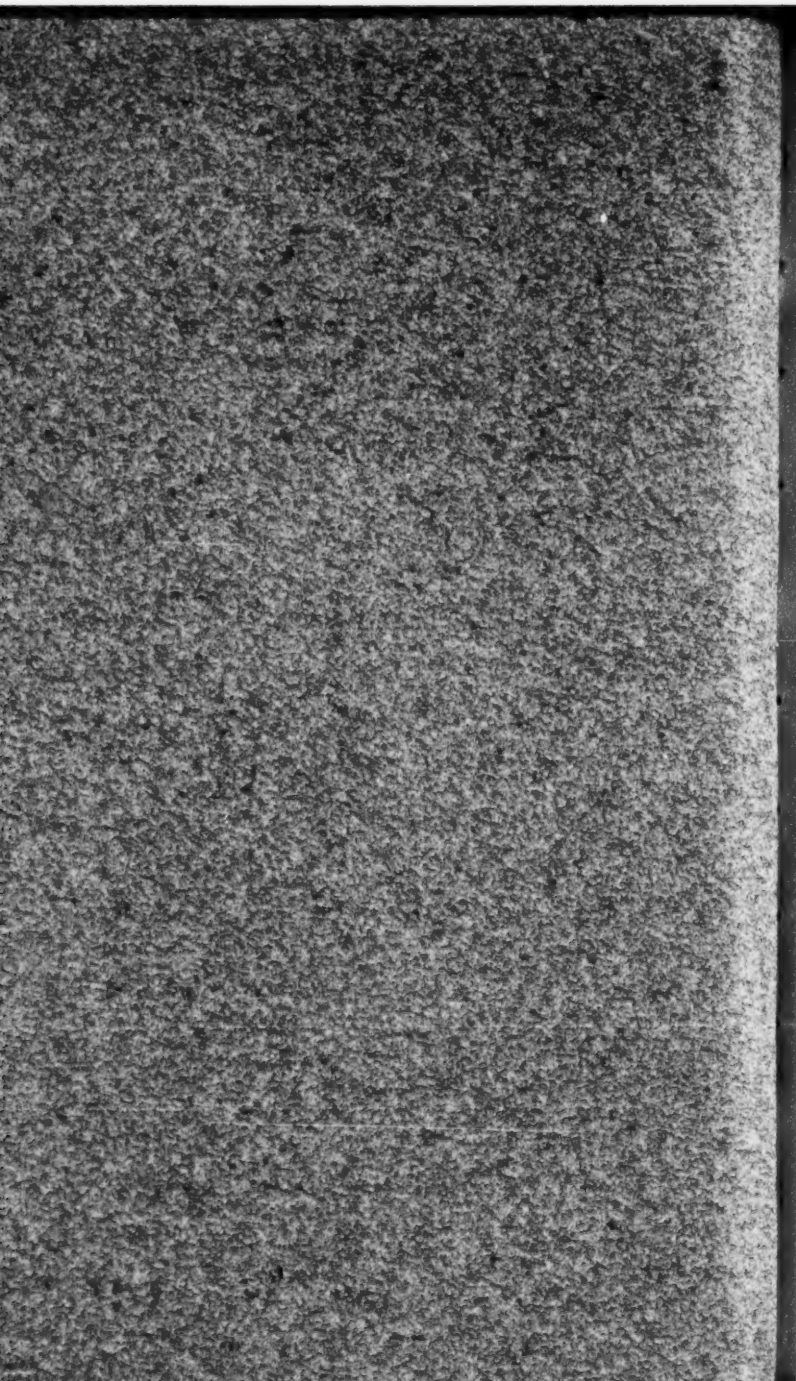
Attorneys for Respondents.



SUBJECT INDEX.

Page.

Statement of the case 1

I. Permits and regulations under which the vaults in question were built, with conditions therein contained, constituted contracts by which respondents acquired vested rights revocable only by the exercise of the police power 6

Condensed statement of the contract under which vaults were built 6

(*a*) Construction and privilege of use of the vaults under such contract constitute vested property right 14

(*b*) Such right is vested and irrevocable unless use is denied in exercise of police power 15

(*c*) Its deprivation by taxation is a taking in contemplation of law 18

II. Section 7 of the act involved impairs the obligation of respondents' contracts if construed as retroactive 19

(*a*) Congress cannot impair obligation of contract even in the exercise of its exclusive right to legislate for the District of Columbia 19

(*a*) Congress has no greater right to impair such obligations than has a State 21

(*c*) If one legislature is prohibited by Constitution from enacting a law it would otherwise have no power to enact, another not so prohibited may not for that reason legally enact such a law 23

III. The act in question and the orders of the Commissioners thereunder are void for lack of uniformity. 29

IV. The act is void for indefiniteness 34

(*a*) No basis for assessment of vault rents is fixed thereby 34

(*b*) Defect cannot be cured by Commissioners; their powers are fixed by statute 36

Page.

V. The act if construed as retroactive is an implied repeal of prior building regulations having the force of law; such repeals are not favored..... 38
VI. If construed as retroactive, the act is inoperative as to respondents..... 39
Comments on brief for petitioner..... 41

TABLE OF CASES CITED.

A.

Arthur vs. Homer, 96 U. S., 137..... 38
Aurora & Laughery Turnpike Co. vs. Holthouse, 7 Ind., 59, 61.. 40

B.

Buchanan vs. Macfarland, 31. App. D. C., 6..... 35
Bowen vs. Striker, 100 Ind., 45..... 40

C.

City of New Orleans vs. Great So. T. & T. Co., 40 La. Ann., 41, 42..... 16
Curry vs. District of Columbia, 14 App. D. C., 423, 438, 440.... 29
Chicago, Burlington & Quincy R. R. Co. vs. Chicago, 166 U. S., 226, 237, 238..... 25
Clay County vs. Savings Society, 104 U. S., 597..... 38
Chicago, M. & St. P. R. Co. vs. U. S., 127 U. S., 406..... 38

D.

District of Columbia vs. Capital Traction Co., 41 App. D. C., 115, 119..... 21
Dana vs. Rock Creek Railway Co., 7 App. D. C., 482..... 18
De Ferranti vs. Lyndmark, 30 App. D. C., 417, 422..... 39

F.

Fay vs. Macfarland, 32 App. D. C., 294, 299..... 37

G.

Page.
Gregsten vs. Chicago, 145 Ill., 451 14
Gardner vs. Newburgh, 2 Johns. Ch., 162 25

H.

Hot Springs Electric Light Co. vs. Hot Springs, 70 Ark., 300, 304, 305 15

K.

Kansas Pacific Railway Co. vs. Commissioners of Wyandotte County, 16 Kan., 587 39

L.

Louisville Gas Co. vs. Citizens' Gas Co., 115 U. S., 683 16
L. & N. Ry. Co. vs. Mottley, 219 U. S., 467 27
Lockwood vs. District of Columbia, 24 App. D. C., 569 36
Lybbe vs. Hart, 52 L. T. Rep. N. S., 634 38
Loan Association vs. Topeka, 20 Wall., 622 20

M.

Mayor and City Council of Baltimore vs. Nirdlinger et al., 131 Md., 600, 621, 609 16
Monongahela Nav. Co. vs. U. S., 148 U. S., 312, 325 26
Murray vs. Gibson, 15 How., 421 40

Mc.

McGuire vs. District of Columbia, 24 App. D. C., 22, 29, 32, 33. 31

N.

N. Y. Steam Co. vs. Foundation Co., 195 N. Y., 43, 51, 52 14

P.

Parish vs. Baird, 160 N. Y., 302, 306 14
Pumpelly vs. Green Bay Co., 13 Wall., 166, 178 26
Plumb vs. Sawyer, 21 Conn., 351 40

S.

	Page.
Sinking Fund Cases, Union Pacific R. R. Co. vs. U. S., 99 U. S., 700, 736	23
Sinnickson vs. Johnson, 17 N. J. Law, 129, 145	25
Shreveport vs. Cole, 129 U. S., 36, 43	39
Spitley vs. Frost, 15 Fed., 299	40

T.

Territory vs. Reyburn, 1 Kan., 551, 557	26
Todd vs. Macfarland, 20 App. D. C., 176, 182	34, 36
Twenty Per Cent Cases, 20 Wall., 179	40

U.

U. S. vs. Heth, 3 Cranch, 399	40

W.

Washington Electric Vehicle Transp. Co. vs. District of Columbia, 19 App. D. C., 462, 470	36
Wood vs. U. S., 16 Pet., 342	38

TEXT BOOKS CITED.

Dillon on Municipal Corporations, Vol. 3, section 1189, page 1873	14
36 Cyc., 1150	38
36 Cyc., 1210	40

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BRIEF FOR RESPONDENTS.

Statement of the Case.

These cases are in this court on writ of certiorari to review the judgment of the Court of Appeals of the District of Columbia in each case, reversing a judgment of the Su-

preme Court of the District rendered therein in favor of the District of Columbia in suits by the latter to recover rent from each of the respondents for the use of vault space beneath the sidewalk adjacent to the several buildings occupied by them.

The facts are substantially as follows:

Saks & Company, respondents in No. 283, being long-term tenants of premises situated at 7th street and Market Space, in the city of Washington, constructed vaults beneath the sidewalk in front of the leased premises under a permit from the District of Columbia dated September 25, 1884 (Rec. No. 283, p. 11). The building regulations of the District then in force prescribed as a fee for a permit to construct such a vault the sum of two dollars ($2.00) per lineal foot thereof, which in this instance amounted to eighty-seven dollars ($87.00).

The Andrews Paper Company, respondent in No. 282, is a tenant of premises Nos. 727-731 Thirteenth street northwest, formerly owned by one James Sharp, who built the vault used by this respondent. The permit for the construction of this vault was issued to Sharp July 30, 1912. At that date the building regulations prescribed one dollar ($1.00) as the permit fee, and by paragraph 9 provided that "no charge will be made for the occupancy of public space by vaults or areas except the usual permit fee," and further that "all permits for such occupancy are subject to revocation by the Commissioners at any time without compensation when the vault space *is needed for public use or improvements.*"

Other important conditions were embodied in these regulations which will be considered in the argument, among them being the requirement that the pavement over the vault

should be constructed at the expense or risk of the owner of the abutting property, and that upon change of grade the vault must be changed and repaved accordingly at the expense of the *owner* of the abutting property.

Abraham Lisner, respondent in No. 284, owns the premises occupied by him, situated corner of 11th and G streets northwest, and under a permit dated January 9, 1914, constructed the vault, which he now uses, beneath the sidewalk adjacent to his premises. The building regulations in force when this vault was built were the same as in 1912, to which reference has been made.

The first building regulations for the city of Washington were promulgated in 1791 by George Washington, then President of the United States, and these prohibited the construction of vaults without a permit. From that time until September 1, 1916, a period of one hundred and twenty-five years, during which there was a continuity of building regulations for the District, embodying many changes applicable to the growth and varying conditions of the city, no charge was ever made for the use or occupancy of vault space beneath the sidewalk other than the fees prescribed at different times and varying in amounts for the issuance of permits to construct such vaults.

Congress, by an act approved September 1, 1916, which was an appropriation act for the fiscal year ending June 30, 1917, provided in section seven thereof:

> "That hereafter the Commissioners of the District of Columbia are authorized and directed to assess and collect rent from all users of space occupied under the sidewalks and streets in the District of Columbia, which said space is occupied or used in connection with the business of said users."

Pursuant to this act, the District Commissioners on October 16, 1916, promulgated an order providing for the method of ascertaining the amount of rentals to be charged and the date on which they should be paid. The latter was by an amendment to this order, dated October 20, 1916, fixed as July 1 of each year, and the amount charged was payable within thirty (30) days after presentation of the bill therefor.

Under the provisions of these orders, each of the respondents was charged an annual rental for the use of the respective vaults referred to and, for reasons hereinafter set forth, each refused to pay this rental. Thereupon the District brought an action in assumpsit against each to recover the rent charged.

The cases were tried together on agreed statements of facts and the Supreme Court of the District rendered judgment in each case in favor of the District for the amount sued for. The agreed statements include what has been already above set forth, and embody the various applicable building regulations in force from 1791 to September 1, 1916, the orders of the District Commissioners above referred to, the permits for the construction of the vaults involved, and as a part thereof the *contractual* conditions under which these permits were issued and accepted. It is also stipulated that the act of Congress authorizing and directing the assessment and collection of rent for vault space and the orders of the District Commissioners made pursuant thereto, affect

> *a*. The owner of premises adjoining the vault who is the user of the vault and built the same for which rent is charged in this case. The vault was con-

structed pursuant to a permit, a copy of which is attached hereto and made part hereof.

b. The tenant of premises adjoining the vault for which rent is charged who is the user of the vault, and constructed the same at his own expense, pursuant to a permit, a copy of which is attached hereto and made a part hereof.

c. The tenant of the premises adjoining the vault for which rent is charged who is the user of it; but did not construct the same; but the same was constructed by the owner under a permit from the District, a copy of which is filed herewith (Rec. 282, p. 10).

The respondents severally appealed to the Court of Appeals of the District from the judgments rendered against them, and that court reversed the judgments, holding in substance that in view of the expressed conditions under which the vaults were constructed and used, one of which was that no charge would be made for use of the space occupied, it must be assumed that Congress, in enacting the rent provision in question, must have intended to preserve vested interests by an act in no sense a police measure, but the sole purpose of which was to provide revenue, and that therefore the act applies only to permits thereafter issued (Rec. 282, pp. 22, 23).

To review the judgments of the Court of Appeals, the cases have been brought before this court by writs of certiorari.

ARGUMENT.

I.

The vaults in question were constructed under permits issued by the District of Columbia, containing conditions and stipulations accepted by the permittees, which, together with the building regulations applicable thereto, formed contracts under which the respondents acquired vested property rights subject to impairment or revocation only by the exercise of the police power of the District for public needs.

Vaults were built in the District of Columbia under acts of Congress and building regulations, between October 17, 1791 and June 26, 1891, when the Commissioners promulgated certain other provisions or regulations which as subsequently amended, were in existence at the time two of the vaults in question were constructed and are in part as follows:

On October 23, 1891, the Commissioners adopted a—

> "schedule of limitations and provisions relative to the projection of portions of buildings beyond the building line, as a basis for the Commissioners' concurrence under the act of March 3, 1891."

In this schedule was the following provision:

> "The area occupied shall be paid for at the rate of fifteen cents per cubic foot. Pavements over vaults *must be constructed at the expense or risk of owner or owners of abutting property.*"

On July 25, 1892, it was ordered—

> "that the paragraph relating to the rate to be paid for the occupation of vaults, in the schedule of limitations and provisions relative to the projection of portions of the buildings beyond the building line, as set forth in the Building Regulations of the District of Columbia, is hereby amended to read as follows: 'The area occupied shall be paid for at the rate of fifteen cents per cubic foot in front of business houses and ten cents per cubic foot in front of dwellings. Pavements over vaults must be constructed at the expense or risk of the owner of abutting property'" (Rec. 282, p. 5).

In the building regulations adopted December 1, 1892, in section nine (9), under the caption "Vaults under pavements," is the following:

> "Vaults in front of business property, the area shall be charged at the rate of fifteen cents per cubic foot, and in front of dwellings at the rate of ten cents per cubic foot, nor shall permit be issued until plan is submitted and approved, showing openings. Pavements over vaults must be constructed at the expense or risk of owner or owners of abutting property."

Section eight (8) fixes a fee for vaults as follows:

> "For each permit for vault, fifteen cents per cubic foot of proposed vault in front of business property, and ten cents per cubic foot in front of dwellings."

The building regulations adopted July 31, 1897, contained the following provision:

"No charge will be made for the occupancy of public space by vaults or areas, except the usual permit fee, and all permits for such occupancy are subject to revocation by the Commissioners at any time without compensation. No permit for vault or area shall be issued until there is submitted and approved plans showing the location and dimensions of the vault or area, and all openings pertaining thereto."

On February 20, 1900, the Commissioners passed the following order, defining the conditions under which permits for vaults would be issued:

"Ordered: This permit is accepted on condition that the District of Columbia has the right at any time to construct under, over or through said vault space, water pipes, gas pipes, sewers, conduits or other pipes of underground construction that the Commissioners of said District may deem necessary to be placed in the space occupied by the vault, without compensation.

And it is further agreed that in accepting this permit that the owner or owners, their heirs, executors, administrators, or assigns, immediately upon notice from the Commissioners of the District of Columbia that the water pipes, gas pipes, sewers, conduits or other pipes, or underground construction are to be introduced in the space occupied by the vault, shall commence to move and forthwith remove, if necessary, any boiler, pipe, wall beam, machinery or construction in or pertaining to said vault, or any fixture or other thing therein, without cost to said District, so as to leave a space clear and sufficient in the judgment of said Commissioners for the introduction and maintenance of any underground con-

struction from time to time deemed necessary by said Commissioners. And said Commissioners reserve the right to enter upon the premises at any time for the inspection and proper maintenance or repair of any work constructed by the District. In case the street roadway or sidewalk is widened, the vault shall be changed to correspond therewith, without expense to the District of Columbia, as directed by the Commissioners of said District. And this permit is accepted with the understanding that the occupation of the vault space is permitted merely as an accommodation to the owner of the abutting premises and that no right, title or interest of the public is in any way waived or abridged thereby, except as expressed in said permit and the conditions aforesaid" (Rec. 282, p. 6).

The building regulations adopted on February 27, 1902, contained the following, among others (sec. 123):

"Par. 2. Plans must be submitted, with an application on an official blank, showing the location and dimensions of the vault and all openings, also the depth and proposed construction; and the vault must be built in accordance with the approved plans.

"Par. 3. The application for a vault must be accompanied by a written agreement, upon an official blank, signed by the owner of the abutting property and in terms of section 124, contracting to release and relinquish the vault space, and to remove, free of expense to the District, all machinery, fixtures, or structural parts of the vault when so ordered by the Commissioners, or needed for public uses."

Also:

> "Whenever the grade is changed, the vault must be changed and repaved, at the expense of the owner of abutting property, to comply with the new grades."

* * * * * * *

No Charge for Occupation of Space.

> "Par. 9. No charge will be made for the occupancy of public space by vaults or areas, except the usual permit fee, and all permits for such occupancy are subject to revocation by the Commissioners at any time without compensation, *when the vault space is needed for public use or improvements.*"
>
> "No vaults shall be constructed so as to interfere with any sewer, water pipe, manhole, gas pipe, tree, or other public work or improvement, nor with any electric conduit carrying fire-alarm or police wires" (Rec. 282, p. 7).

The building regulations adopted October 18, 1909, contained the following (sec. 123*a*):

> "Par. 3. The application for a vault must be accompanied by a written agreement, upon an official blank, signed by the owner of the abutting property and in terms of section 124, contracting to release and relinquish the vault space, and to remove free of expense to the District, all machinery, fixtures, or structural parts of the vault when so ordered by the Commissioners or needed for public uses."

No charges for vaults were made, except $1.00 for permit to construct the vault. The permit issued was similar to the

one provided for in the order of February 20, 1900, before quoted. The building regulations adopted January 18, 1913, in force on September 1, 1916, contained various provisions relative to the construction of vaults, but made no charge therefor, except the usual permit fee of $1.00. Sections 123*a* and 124.

The permit issued was the same, with the following addition, which also appears in the revisions of 1902 and 1909:

> "And I herewith submit a statement of the proposed and intended uses of the vault, and a list of all machinery and fixtures that will be placed therein, subject to the limitations of section 123, and I further agree to use the vault for the purposes authorized by the Commissioners and for no other purposes, under the terms of this section and agreement, and subject to the penalties for non-compliance as provided in section 182 of the Building Regulations for the District of Columbia.
>
> ——— ———,
> ——— ———,
> ——— ———,
> *"Owners of Abutting Property."*

(Rec. 282, p. 8.)

From the foregoing, the express contract between the District and an applicant for a permit to build a vault, existing when the vaults used by the respondents Andrews Paper Company and Lisner were constructed, may thus be stated:

In consideration of the payment of the sum of one dollar by the applicant concerned and the further agreement on his part—

(*a*) to construct the pavement over the vault at the expense and risk of the *owner* of the abutting property;

(*b*) to accept the permit on condition that the District has the right to construct in, through, etc., the vault space such water pipes, conduits, and other public construction as may be deemed necessary by the Commissioners;

(*c*) that the owner, his heirs, administrators, or *assigns*, upon notice from the Commissioners that the construction mentioned in (*b*) is to be introduced into the vault space, shall move and forthwith remove, if necessary, any boiler, machinery, or other fixture or thing therein, for the purpose of such construction and the maintenance thereof;

(*d*) to change the vault without expense to the District to correspond to any widening of the street, roadway, or sidewalk;

(*e*) to change the vault to correspond to any change of grade and repave, this to be done at the expense of the *owner* of the abutting property;

(*f*) to so construct the vault as not to interfere with any sewer, water pipe, tree, or other public work or improvement;

(*g*) to sign a "written *agreement* * * * *contracting* to release and relinquish the vault space and *remove free of expense* to the District" all fixtures or "structural parts of the vault when so ordered by the Commissioners or needed for public uses;"

(*h*) to accept the permit subject to revocation by the Commissioners at any time *without compensation* "when the vault space is needed for public use or improvements;"

(*i*) to accept the permit with the understanding that the occupation of the vault space is permitted merely as an accommodation to the owner of the abutting premises, "and that no right, title, or interest of the public is in any way waived or abridged thereby, *except as expressed in said permit and the conditions aforesaid;*"

(*j*) to use the vault only for the purposes authorized by the Commissioners, subject to penalties for non-compliance of such agreement—

the District agreed to permit the applicant, his heirs, administrators, or assigns, to use and occupy the vault space *without charge* for the use and occupancy thereof until such time as the particular space should be needed for public use or improvements.

This is the contract under which the vaults used by the respondents Andrews Paper Company and Lisner were constructed.

The respondent Saks & Company, in 1884, paid $87 as the fixed charge and compensation for the privilege of erecting and occupying the vault space used by it, and all the rights of the District with respect to revocation, entry, and subjection to the paramount needs of the public were necessarily implied in so far as this vault is concerned. For thirty-two (32) years no rental was ever charged, and between 1897 and 1916 the District, in its legally authorized building regulations, publicly announced that no such charge would be made. Free occupancy in this instance may, therefore, by the acts of the parties, in addition to the payment of the sum of $87.00, be assumed as having been understood to be a part of the contract with Saks & Company.

(a) *The erection of the vaults at the cost of the owner, and the privilege of the use and occupancy thereof pursuant to and in compliance with the expressed terms of the permit and contract above set forth constitute a vested property right.*

> "A vault constructed under a permit from the municipality is in itself a species of property; * * *."
>
> Vol. 3, Dillon on Municipal Corporations, sec. 1180, page 1873.

A vault under the sidewalk constructed with the permission of the city authorities by the owner of the abutting building, is an easement appurtenant to the abutting owner's premises and is in itself a species of property which the owner may protect as fully as any other property.

Parish *vs.* Baird, 160 N. Y., 302, 306.

New York Steam Company *vs.* Foundation Company, 195 N. Y., 43, 51, 52.

In Gregsten *vs.* Chicago, 145 Ill., 451, the court held that:

> "A city under special legislative authority, as well as its general powers, may grant permits for and regulate the building of vaults under the streets, alleys and sidewalks, and require such compensation for the privilege as it may deem reasonable and just, when such permits relate solely to such use of the alleys, etc., as is in nowise inconsistent with their use by the public; and such permit when accepted and acted on by the holder by making costly improvements required, will constitute a contract between the city and such holder irrevocable at the mere will of the city" (Syl.).

(b) This property right becomes vested and irrevocable unless its use is denied by the municipality in the exercise of its police power.

In the case of Hot Springs Electric Light Company *vs.* Hot Springs, 70 Ark., 300, 304, 305, an electric light company having erected a plant pursuant to a city ordinance, it was thereafter sought by the city council by a subsequent ordinance to require the company to pay annually the sum of fifty cents for every pole that had been erected pursuant to the original ordinance, which, in all respects, had been complied with by the company. The court in denying the city council the right to collect such additional charge remarked:

> "But cities are as much bound by their lawful contracts as private persons, and it follows from the same reasons that, the city having granted to this company the privilege of erecting and maintaining its poles along the city streets for a period of twenty years, and the grant having been accepted by the company, and the company having expended large sums of money and made valuable improvements on the faith of such grant, the city council cannot now impose additional burdens, and, in effect, change the contract without the consent of the company. * * * So far as the evidence shows, the court stated, it is an attempt to charge the company for the privilege of using the streets, which had been previously granted to it, and is, in effect, an effort on the part of the city to change the terms of its contract with the company, and to impose additional burdens on the company without its consent. We are of the opinion that this cannot be done * * *."

Of similar import is the case of Louisville Gas Company *vs.* Citizens' Gas Company, 115 U. S., 683.

In Louisiana it was held that:

> "A municipal ordinance granting to a particular company, authority to construct and maintain telephone lines on the streets, without any limitation as to time *and for consideration stipulated when accepted and acted on by the grantee by a compliance with all its conditions and the construction of a valuable and expensive plant, acquires thereby the features of a contract which the city cannot thereafter abolish or alter in its essential terms without the consent of the grantee;* * * *."
>
> City of New Orleans *vs.* Great So. T. & T. Co., 40 La. Ann., 41, 42.

In the case of Mayor and City Council of Baltimore *vs.* Nirdlinger *et al.*, decided December 13, 1917, by the Court of Appeals of Maryland, and reported in 131 Md., 600, 609, where an attempt was made by the City Council to revoke certain vault privileges, among other minor privileges of the same character, such revocation being primarily for the purpose of obtaining revenue, the court made clear in the concluding language of its opinion the principle now under consideration.

The court said:

> "When a city grows as Baltimore has there may be more necessity for preventing abutters and others from in any way encroaching upon the highways except in so far as may be necessary temporarily for building or like purposes, and it may be very desirable to avoid some of the encroachments in the

future, but in some of the cases before us, it is practically admitted that the board did not expect the parties to remove the alleged obstructions, but did expect them to pay, and in some instance repay, for them and continue them as they are, subject to such regulations and restrictions as may be imposed on them in the grants. It can make no difference to the public in the use of a street whether a vault, areaway, pole, sign, coal-hole, marquee or show window is paid for or is free, for it is just as much an obstruction in the one case as in the other. Indeed, it might well be contended that legislation authorizing a municipality to charge for such privileges, to some extent recognizes the necessity for them, as it is not to be presumed that the legislature would grant the power *exclusively* as a revenue measure, and when they do materially obstruct the public they ought not to be granted, unless there is some real necessity for them. But when they are granted and paid for, or were granted at a time when no money value to the city for them was taken into consideration but the authorities deemed it proper, possibly desirable for the city, to allow them, and the parties were induced to construct their buildings accordingly, instead of keeping back of the building line so they could keep them on their own ground, or to erect costly improvements, the successors in office of those who granted them ought not to be required, in the discharge of their duties as they understand them, to repudiate the action, or even *inaction* with knowledge of what was being done, of their predecessors in office if that must result in great injury or gross injustice to those who acted in good faith upon the grant, permission or consent of those in power at the time, unless there is no other proper course for them to pursue."

It is clear that the contracts and permits in the instant cases contemplated that while the same were revocable for *certain reasons* therein set forth, this revocability was limited and restricted by the terms of the permits to the proper *exercise of the police power*. It has not and cannot be contended that the rent sought to be collected in these cases can be recovered under any proper exercise of the police power. The authorizing act is a revenue measure only.

(c) *The deprivation of a vested property right by means of taxation is a physical taking in contemplation of law.*

> There is no "substantial distinction between the taking of private property by the actual physical invasion of it, and the deprivation of the owner's use of it by acts that amount to the destruction or impairment of that use."
>
> Dana *vs.* Rock Creek Railway Company, 7 App. D. C., 482, 496.

It is needless to say that as the city of Washington increased in size as well as population, and hotels, office buildings, and structures to be used as stores and housing for various commercial enterprises were erected, vaults under the sidewalks fronting these buildings became common, if not indispensable, and were a recognized adjunct to the edifices in connection with which they were built. The cost to the landowners of these subsidewalk excavations and improvements has run into many thousands of dollars, expended under the conditions and in reliance upon the terms of contracts with the District granting the right to build such vaults.

The imposition afterward of the annual charge directed in the act complained of imposes, we submit, such a burden upon the property rights of those who constructed the vaults, when it falls on them, as amounts to a physical taking of such rights by an impairment of the use of the vaults, acquired under the contracts mentioned.

II.

Section 7 of the act of September 1, 1916, impairs the obligation of the existing contracts of the respondents, and is therefore void as to them and all others in like situation if the act be construed to be retroactive.

(a) Congress in the exercise of its right of exclusive legislation for the District of Columbia has no greater power to impair the obligation of an existing contract than has a State, which is expressly inhibited from so doing by article 1, section 10, of the Constitution of the United States.

The power of Congress to legislate for the District, while made exclusive by article 1, section 8, paragraph 17, of the Constitution of the United States, is neither unlimited nor arbitrary.

> "The power of Congress to legislate for the District of Columbia in all matters proper for legislation, whether of a general political nature or of merely municipal character, is given by the Constitution of the United States; and the extent of that power we regard as well established by judicial authority. The power is exclusive, but it is not unlimited, nor is it arbitrary. There is no place in our governmental

> system for arbitrary or unlimited power. Our institutions are radically at variance with the theory of the existence of any such power anywhere in our country."
>
> Curry *vs.* District of Columbia, 14 App. D. C., 423, 438.

In the case of Loan Association *vs.* Topeka, 20 Wall., 655, 663, Mr. Justice Miller said:

> "The theory of our Governments, State and National, is opposed to the deposit of unlimited power anywhere. The executive, the legislative, and the judicial branches of these governments are all of limited and defined power. There are limitations on such power which grow out of the essential nature of all free governments. Implied reservations of individual rights, without which the social compact could not exist, and which are respected by all governments entitled to the name. No court, for instance, would hesitate to declare void a statute which enacted that A. and B., who were husband and wife to each other, should be so no longer, but that A. should thereafter be the husband of C., and B. the wife of D., or which should enact that the homestead now owned by A. should no longer be his, but should henceforth be the property of B."

In Curry *vs.* D. C., *supra*, the court, after quoting Mr. Justice Miller, said:

> "The power of Congress in the District of Columbia, as elsewhere throughout the Federal Union, is distinctly limited by all the express guaranties of individual right contained in the Federal Constitution. No more in the District of Columbia than anywhere

else within the United States, could the legislature of the Union pass a bill of attainder or an ex post facto law, or dispense with trial by jury, or establish a religion, or authorize unreasonable searches. All the general limitations imposed by the Constitution upon its authority are as applicable in the District of Columbia as in any other part of the United States. And not only are these express limitations applicable, but, in the language of Mr. Justice Miller, in the case just cited, all the 'implied limitations which grow out of the nature of all free governments' are equally applicable. The 'exclusive' power of legislation over this District which is vested in Congress by the Constitution, must be assumed to extend only to all lawful subjects of legislation; and invasions of those fundamental individual rights, which lie at the foundation of the social compact, and for the maintenance of which free governments exist, are not lawful subjects of legislation."

(b) Congress has no greater right in principle to impair the obligation of a contract than has a State.

The case most frequently cited in this jurisdiction upon this proposition of law is that of the District of Columbia *vs.* Capital Traction Co., 41 App. D. C., 115, 119, where Mr. Chief Justice Shepard, speaking for the court, used the following language:

"In the first place, the prohibition of laws impairing the obligations of contracts applies to the States, and not to the United States. The prohibitions to the United States are those of the 5th Amendment, that no person shall be deprived of property without due

process of law, and that private property shall not be taken for public use without just compensation."

With reference to the above case, two observations may be made:

1. The language quoted states what is conceded to be true, namely, that article 1, section 10, of the Constitution of the United States, relating to the "impairing the obligations of contracts" constitutes an express limitation only upon the States; but the case nowhere decides that this limitation as a matter of fundamental law, subject only to the proper exercise of the police power, is not also a limitation upon Congress.

2. This becomes more manifest when the facts upon which the opinion turned are analyzed. The court, however, held that Congress did not impair the obligation of an existing contract nor deprive the railway company of property without due compensation, even under the 5th Amendment, where Congress in granting the charter to the railway company expressly reserved the power to alter, amend or repeal it. The question of the existence of such reserved power therefore was the matter decided by the court's opinion.

It is not claimed in this brief that the inhibition in the Constitution relating to the "impairing of the obligation of a contract" imposes in terms a restriction upon congressional legislation. Our contention is that this restriction is imposed upon Congress by the fundamental principles of justice governing all legislative acts, as will appear more fully in the discussion of the following principle:

(c) *It does not necessarily follow that because a legislature is by express constitutional inhibition, forbidden to enact a law which it would otherwise have no power to enact, another legislature not so subject to constitutional limitation may legally enact such a law.*

In the dissenting opinion in what is known as the Sinking-Fund Cases, Union Pacific Railroad Company *vs.* United States, 99 U. S. 700, 736, the following language is used:

> "Now, where is the power of Congress to add new terms to any contract made with the United States, or made between any two private individuals? Where is the power to annul vested rights? It is certainly not to be found in the Constitution. True, the provision that no State shall pass any law impairing the obligation of contracts applies only to State legislation. For such legislation the prohibition was necessary; for State legislatures have all legislative power which is not expressly denied to them. But no necessity existed for imposing such a limitation on the power of Congress. As Mr. Hamilton said in the eighty-fourth number of the Federalist, 'Why declare that things shall not be done which there is no power to do?' Congress has no power except such as has been expressly granted to it, or such as is necessary or proper for carrying into execution the powers specified, and those vested by the Constitution in the Government, or some department or officer thereof. I search in vain for any express or implied grant of power to add new terms to any existing contracts made by or with the Government, or any grant of power to destroy vested rights. No power has been given to Congress to lessen the obligations of a con-

> tract between private parties by direct legislation, except by the enactment of uniform laws on the subject of bankruptcy."

The soundness of the foregoing proposition of law was not denied or in the slightest degree questioned, but on the contrary was assumed by the court in its majority opinion delivered by Mr. Chief Justice Waite (page 718), who said:

> "The United States cannot any more than a State interfere with private rights, *except for legitimate governmental purposes.* They are not included within the constitutional prohibition which prevents States from passing laws impairing the obligation of contracts, but equally with the States they are prohibited from depriving persons or corporations of property without due process of law. They can not legislate back to themselves, without making compensation, the lands they have given this corporation to aid in the construction of its railroad. Neither can they by legislation compel the corporation to discharge its obligations in respect to the subsidy bonds otherwise than according to the terms of the contract already made in that connection. *The United States are as much bound by their contracts as are individuals.* If they repudiate their obligations, it is as much repudiation, with all the wrong and reproach that term implies, as it would be if the repudiator had been a State or a municipality or a citizen. No change can be made in the title created by the grant of the lands, or in the contract for the subsidy bonds, without the consent of the corporation. All this is indisputable."

It thus appears from the above quotations, that both majority and minority opinions admitted and endorsed the

proposition that the United States acting through Congress, to the same extent as an individual, were bound by their contracts, and that no rights accruing thereunder could be impaired by any subsequent legislative act. The majority opinion held that Congress did not impair the obligation of its contracts with the railroad companies involved, but required some additional security in the way of a "sinking fund" from the companies, pursuant to and in accordance with the reserved powers of Congress; and while the minority opinion took a different view as to the effect of this legislation upon the contractual rights of the railroad companies involved, *yet there was no real divergence of opinion concerning the principle* to which allusion has just been made.

It will be observed that the facts underlying the instant cases disclose that the vested contract rights herein involved constitute a definite contractual relation between the respondents and the District of Columbia, which is an agent of the Congress of the United States in all matters of this character.

In Chicago, Burlington and Quincy Railroad Company *vs.* Chicago, 166 U. S., 226, 237, 238, the court, through Mr. Justice Harlan, said:

> "In the early case of Gardner *vs.* Newburgh, 2 Johns. Ch., 162, there being no provision in the Constitution of the State of New York on the subject, Chancellor Kent said that it was a principle of natural equity, recognized by all temperate and civilized governments, from a deep and universal sense of its justice, that fair compensation be made to the owner of private property taken for public use. In Sinnickson *vs.* Johnson, 17 N. J. Law., 129, 145, it was held to be a settled principle of universal law,

> reaching back of all constitutional provisions, that the right to compensation was an incident to the exercise of the power of eminent domain; that the one was so inseparably connected with the other that they may be said to exist, not as separate and distinct principles, but as parts of one and the same principle; and that the legislature 'can no more take private property for public use without just compensation than if this restraining principle were incorporated into and made part of its State constitution.' These cases are referred to with approval in Pumpelly *vs.* Green Bay Co., 13 Wall., 166, 178, and in Monongahela Nav. Co. *vs.* United States, 148 U. S., 312, 325, this court saying in the latter case: 'And in this there is a natural equity which commends it to every one. It in no wise detracts from the power of the public to take whatever may be necessary for its uses; while on the other hand, it prevents the public from loading upon one individual more than his just share of the burdens of government, and says that, when he surrenders to the public something more and different from that which is exacted from other members of the public, a full and just equivalent shall be returned to him.' "

These principles have also been adopted by State courts whenever they have had occasion to consider them, as for instance in the case of The Territory *vs.* Reyburn, 1 Kan., 551, 557, the court saying:

> "It is argued that the provision of the Constitution of the United States, prohibiting the States from passing any law impairing the obligation of a contract, does not extend to or include the Congress of the United States, and hence, as they are not forbid-

den, they may pass such laws. This is an extreme error, and grows out of a misunderstanding of the organization and structure of our Government, and is predicated upon the erroneous idea that the general government is an original sovereignty. The separate States were original sovereignties, and may have had power as such, to impair the obligation of contracts until they formed the Constitution, by which they voluntarily prohibited themselves from the exercise of it, the existence of which right will be doubted, and the use of it was always deservedly condemned by all good and just men. The general government is not an original but a derivative sovereignty, upholding such powers only as are granted to it by the Constitution, or such as necessarily arise and follow from those specifically granted. The general government is the delegated agent, with the Constitution in its hand as its warrant of attorney, beyond whose provision it can not go in its action. The Constitution will be searched in vain to find a special grant of power to impair the obligation of a contract; and who shall justly say that this power, immoral in itself, and abhorrent to every man's sense of natural justice, is a necessary implication arising from the powers granted? We deny it."

The case of L. & N. Ry. *vs.* Mottley, 219 U. S., 467, is not adverse to the principle for which we here contend. The court there held that a contract made in 1871 to carry a passenger without charge in consideration of the relinquishment by the latter of his claim for damages, was not enforceable by the passenger after the passage by Congress of the Interstate Commerce Act of June 29, 1906, prohibiting a carrier from charging a different compensation from that

specified in its published tariffs; and that the statute meant that transportation should be paid for by all alike and for cash. This decision rested upon the following grounds:

1. The unrestricted right of Congress to regulate interstate and foreign commerce.

2. Such contracts are made with the knowledge of and subject to such paramount power in Congress (482).

3. The act in question was in execution of a public policy applicable to interstate transportation (477).

4. No obligation of a contract can extend to the defeat of legitimate governmental authority (482).

5. The framers of the Constitution never intended that this exercise by Congress of its constitutional power should ever be impaired by a contract previously made (482).

6. The liberty of an individual to make private contracts would result in the private regulation of interstate commerce and prevent Congress from the exercise of its constitutional right to regulate commerce among the States.

7. The interstate act of 1906 involves a change in the public laws in the *exercise of police powers*, to which all private contracts must yield (485).

8. If by the simple device of a contract *a police power* could not be exercised then all reforms might be prevented (487).

We respectfully submit, therefore, that the contracts of the respondents under which, for valuable consideration, they were granted the use of vault space free of charge for such occupancy could not legally be impaired by Congress and their property rights injured without their consent, unless in the exercise of the police power, which admittedly was not attempted to be exercised in the act complained of.

III.

Section 7 of the act of September 1, 1916, and a fortiori the orders of the Commissioners issued thereunder, are void for lack of uniformity and because they impose burdens upon some owners of property and not upon others similarly situated.

Attention is invited to the peculiar phraseology of the act under discussion. By it the Commissioners are authorized and directed to collect rent from all *users* of space, etc., "which said space is *occupied or used in connection with the business* of said *users*."

This provision and the orders enforcing it, work out thus: An owner of abutting property who before the passage of the act, expended large sums of money in constructing a vault and complied with the terms of his contract under which he acquired the right to use it, if *he so uses it in connection with his business*, must now pay an annual rental for such use. He is also required, at his expense, to change the vault and to repave the sidewalk, or relinquish it and remove costly fixtures therein, as the case may be, when the public needs so require.

Another abutting owner next door who built his vault under the same contract, conditions, burdens, and expense, escapes the rental charge because he does not use the vault *in connection with his business*, though he may *use* it for other legitimate purposes, or because he has leased his property and the *lessee* uses the vault. This owner may receive from his lessee a larger rent for his property than if there

were no vault. To that extent he uses the vault—*i. e.*, in the sense of leasing it.

In these illustrations the latter owner pays no rent; the former, with the same burdens and under the same contract as his fellow-owner, pays rent.

Again, a vault may be used in common by several. Some use it in connection with their business, some do not. All *use* it, yet for its *use* some pay and others do not.

In the instant cases, the owner of the property occupied by Andrews Paper Company, whose assignor constructed the vault, pays no rent; but Lisner, who owns and who constructed the vault used by him, is charged an annual rental. The rental required by the statute constitutes a penalty imposed solely on the user whose use is in connection with his business. Hence in some instances the law violates the provisions of the contract under which the vaults were built; in others it does not. It in effect places a burden upon the business use of vaults, leaving their use for other purposes free. In other words, the rent is based upon the character of use only. Again, if several use a vault in common for business purposes, who is to pay? Finally, the owners of dwellings are exempt from the operation of the act.

Discrimination of the character just pointed out, has been judicially condemned.

Thus, Congress undertook to require the removal of snow and ice from the sidewalks by tenants and occupants and owners of buildings, etc. The first paragraph of the act attempting to do this, reads:

> "Be it enacted * * * that it shall be the duty of every tenant or occupant of any lot or lots of

ground within the fire limits of the District of Columbia, improved by a house or building adjacent to any improved sidewalk, within the first four hours of daylight after the ceasing of any fall of snow, to cause said snow to be removed from the paved sidewalk adjacent to such lot or lots, etc."

Section 3 provided:

"That it shall be the duty of the owner or owners of every vacant or unimproved lot within the fire limits of the District of Columbia fronting or abutting upon a paved sidewalk, within the first four hours of daylight after the ceasing of any fall of snow, as set forth in paragraph 1 hereof, to cause such snow to be removed from the paved sidewalk in front of such lot or lots in the same manner, and to the same extent, and subject to the same penalty, as provided in said section, etc."

In the case of McGuire *vs.* District of Columbia, 24 App. D. C., 22, 29, 32, 33, construing these provisions, the court, after adverting to the beneficent purpose of this law—that of saving life and limb from accidents due to slippery sidewalks; and after remarking that the court should therefore look with favor upon the validity of such legislation, observed:

"Almost in the very first line we are confronted with an ambiguity that amounts almost to an absurdity. It is provided in the 1st section that 'every tenant or occupant' of improved property within a certain specified district shall cause the snow and ice to be removed from the adjoining sidewalk under a prescribed penalty. When there are a dozen or more

tenants or occupants of one improved piece of property, such, for example, as an apartment house, of which class of building we have now very many specimens in our city, are all the occupants of apartments therein liable for the performance of the prescribed duty, and punishable for failure to comply with the requirements of the act? And if not all are liable, is any one of them? An answer in the affirmative to either of these questions involves an absurdity; an answer in the negative leaves the statute without any provision whatever for the removal of snow and ice from the sidewalks in front of these apartment houses. For the owner is not by the statute required to do it, unless, perhaps, he happens, which would only be possible in rare cases, to be an occupant, also, of the premises; and certainly no employee about the premises would be a tenant or occupant in the eye of the law amenable to the performance of the duty required by the statute. In the case of improved property, not the owner, but the tenant or occupant, is required to do the work or have it done; and this, of course, is eminently right and proper if the work is to be done at all by the individual citizen."

The court says further:

"But probably the most glaring infirmity of this enactment is its sharp discrimination between the tenants and occupants of improved lots and the owners of vacant or unimproved lots. When it is remembered that the sole purpose to be subserved is the removal of snow and ice from the paved sidewalks of the District, and the duty of such removal is sought to be imposed upon individual citizens with reference to their occupation or ownership of adjoining prop-

erty, the utmost equality and uniformity must be observed in the imposition of the duty. It will not do to require one owner of property, by reason of his ownership, to perform a duty from which the owner of the adjoining property is relieved. *The owner of vacant property cannot be subjected to liability to which the owner of the adjoining improved property is not subjected,* when the thing to be done is based exclusively on the propinquity of such property, and can have no possible reference to the condition of such property as improved or unimproved. The necessity of the removal of snow and ice from the sidewalks is precisely the same in the one case as in the other. To punish the one owner, for failure of compliance with the act, by fine and imprisonment and an assessment upon his property, and to exempt the other from all duty and from liability for the same precise thing, is a species of inequality which is repugnant to the principles of natural justice; and the inequality is not obviated by the fact that the duty, which might otherwise be imposed upon the owner of improved property, is by the enactment shifted to the tenant or occupant. The fact remains that the owner of unimproved property is charged with a burden, by reason solely and exclusively of his ownership, with which the *owner of adjacent improved property is not charged,* notwithstanding that the burden has no relation whatever to the character of the property, whether improved or unimproved. For we are not to be understood as holding that there may not be difference of burden where the difference has a reasonable relation to the difference of character of the property."

We submit that the facts in the instant cases involving the disciminative operation of the vault-rent law as above illustrated, come within the reasoning of the court in the case cited. Other instances of similar inequality may be conceived, such as where vaults under the sidewalks adjacent to apartment houses might be used by the occupants thereof or by the owner, or by both. The same is true as to a large number of office buildings in the city of Washington, and indeed it is not unlikely that cases may arise where the fee to the sidewalk is in the owner of the abutting property and he might under the present law be charged rental for vaults of which he himself is the owner, for it has been judicially determined in this District that the title to lands embraced in the sidewalks in those sections north of Florida avenue and west of Rock creek is the owner of the abutting property.

IV.

Section 7 of the act of Congress in controversy is void for indefiniteness.

(*a*) *It will be observed that under the section involved "The Commissioners of the District of Columbia are authorized and directed to assess and collect rent from all users, etc. * * * " No basis whatsoever is provided for fixing the amount of the assessments. As to whether assessments are to be computed according to the linear feet, square feet or the area of space occupied, or upon the value of the abutting property or otherwise the act is silent.*

In Todd *vs.* Macfarland, 20 App. D. C., 176, 182, the court had before it an act of Congress providing for the wid-

ening and extending of certain streets. The act among other things provided that when the verdict of the jury was confirmed by the court, "the assessments shall become a lien upon the land assessed and shall be collected as special improvement taxes in the District of Columbia and payable in five equal instalments, with interest at the rate of 6 per cent per annum until paid." The court said it should be observed, that the assessments were to be collected as special improvement taxes were collected, and were made payable in five equal instalments without saying at what intervals of time such payments should be made, whether annually, semi-annually or monthly; and that it was manifest that the amounts of the assessments were not to be paid at once, and whatever time was intended to be given for payment was intended to be divided so as to make the payments equal in amount and at equal intervals of time commencing from the first of the five instalments; but the question of time was left in entire uncertainty and consequently by reason of the omission to specify the particular time when the instalment of assessment became due and payable the power of collection was defective, and the assessments, while the amounts had been ascertained and remained liens upon the lands, could not be collected by the District authorities. The court suggested that such defective means of collection might be cured and rendered effective by a subsequent Congress.

It is observed by the court in the above case that because the damages for the land taken had already been paid to the parties entitled thereto as authorized by the act there would be no justice in avoiding entirely the assessments for benefits.

A similar question arose in the case of Buchanan *vs.* Macfarland, 31 App. D. C., 6, and the court based its decision

upon the reasoning in the case of Todd *vs.* Macfarland, above cited.

In Lockwood *vs.* District of Columbia, 24 App. D. C., 569, 571, the interpretation of certain portions of the personal tax law was in question. The court, speaking through Mr. Justice Shepard, observed:

> "The established rule of the courts is that all statutes imposing restrictions upon business or the common occupations of the people, or levying a tax upon them, are to be construed strictly.
>
> "As was said by Chief Justice Alvey in delivering the opinion of this court in Washington Electric Vehicle Transp. Co. *vs.* District of Columbia, 19 App. D. C., 462, 470; 'All the authorities agree in maintaining that all charges upon the citizen must be imposed by clear and unambiguous language, because, as it is said, they operate as penalties. In a case of doubt that construction most beneficial to the citizen must be adopted.' Here, as we have seen, the penalty for pursuing this occupation without the payment of a considerable license tax is a severe one, and it is eminently just, therefore, that the citizen should be reasonably well informed, *by the language of the statute itself,* of his obligation to pay money demanded of him, the failure to pay which, if he errs in its construction, may subject him to that penalty."

(*b*) *Counsel for respondents contend that the infirmity discussed under this head can not be cured by any act on the part of the Commissioners of the District of Columbia, as no sufficient authority for so doing is vested in them under this or under any other act so far as counsel are able to ascertain. The Commissioners are creatures of statute and possess no im-*

plied powers. The mere fact that thus far the rental assessed is fair, does not cure the defect in the act complained of. Future orders of the Commissioners assessing larger rentals would be likely to involve those concerned in yearly litigation to obtain judicial determination of the fairness of the rental charge for a particular year, or series of years.

In Fay *vs.* Macfarland, 32 App. D. C., 294, 299, wherein certain statutes authorizing the taking of private property for public use were considered, the court in its opinion, on page 299, states:

> "Statutes like the present, authorizing the taking of private property for public use, are to be strictly construed. The Commissioners are creatures of statute. They possess no implied powers. Their authority to act must be gathered from the express terms of the law granting it. Hence, in any attempt to act under a statute granting authority, they must comply literally with its requirements."

It is conceded that Congress may confer upon the Commissioners of the District of Columbia, subject to certain limitations, the power to levy taxes in a given case, just as a State legislature may create a municipality within its territorial limits and clothe it with certain powers of taxation. But it is denied that Congress may by the general authority contained in the appropriation act of September 1, 1916, vest the Commissioners of the District with absolute and arbitrary power both to assess and to collect rent for vault space, without in any way limiting the Commissioners with respect to the amount, the terms or the manner of the assess-

ment and collection thereof, or otherwise defining the extent of their powers.

V.

Section 7 of the act of September 1, 1916, if construed as retroactive, is an implied repeal of prior regulations of the Commissioners made pursuant to and having the force of law. An implied repeal is not looked upon with favor by the courts.

Repeals by implication are not favored and statutes will not be construed to so operate, unless such intention is clearly expressed by the legislature.

Arthur *vs.* Homer, 96 U. S., 137.
Clay County *vs.* Savings Society, 104 U. S., 579.
Chicago, M. & S. P. R. Co. *vs.* U. S., 127 U. S., 406.

There must be positive repugnancy between the new law and the old to work a repeal of the former by implication; and even then the old law is repealed only to the extent of such repugnancy. If any part of the earlier act can stand it will not be repealed (Wood *vs.* U. S., 16 Pet., 342).

It will not be presumed that a legislature by the enactment of subsequent statutes intended to repeal an earlier one unless it has done so by express terms (36 Cyc., 1150, and cases cited). Among these is the leading case of Lybbe *vs.* Hart, 52 L. T. Rep. (N. S.), 634, where it was held that when a statute is not expressly repealed, the burden is on those who assert that there is an implied repeal to show that the statutes can not consistently stand together. So far as reasonably possible several statutes, although seemingly in

conflict with each other, should be harmonized and force and effect given to each.

In Kansas Pacific Railway Co. *vs.* Commissioners of Wyandotte County, 16 Kan., 587, it was held that where there is no way of reconciling conflicting clauses of a statute, and nothing to indicate which the legislature regarded as of paramount importance, force should be given to those clauses which would make the statute in harmony with other legislation on the same subject.

It will be observed that we are under the necessity here of harmonizing the act of September 1, 1916, with prior building regulations, but these have the force of an act of Congress (Berry *vs.* D. C., 32 App. D. C., 96) and provide that "no charge will be made for the occupancy of public space by vaults."

VI.

If section 7 of the act of September 1, 1916, is retrospective and retroactive in its character, it is inoperative as to the respondents.

(*a*) *The act of September 1, 1916, if it is to be given the construction contended for by the petitioner, is retroactive.*

It is a rule of statutory construction that all statutes are to be construed as having a prospective operation, unless the purpose and intention of the legislature to give them a retrospective effect "is manifest beyond reasonable question" (Shreveport *vs.* Cole, 129 U. S., 36, 43).

This principle was thus expressed in De Ferranti *vs.* Lyndmark, 30 App. D. C., 417, 422:

> "It is a general rule of statutory construction that, in the absence of language in a statute clearly expressing an intention to the contrary, statutes will be construed prospectively."

Words in a statute ought not to have a retrospective operation unless they are so clear, strong and imperative that no other meaning can be annexed to them (U. S. *vs.* Heth, 3 Cranch, 399).

See also Murray *vs.* Gibson, 15 How., 421; Twenty Per Cent cases, 20 Wall., 179.

The rule that statutes are not to be construed retrospectively, unless such construction is plainly intended by the legislature, applies with peculiar force to those statutes, the retrospective operation of which impairs or destroys a vested right (36 Cyc., 1210; Plumb *vs.* Sawyer, 21 Conn., 351; Spitley *vs.* Frost, 15 Fed., 299; 5 McCrary, 43, reversed on another ground in 121 U. S., 552).

In Aurora and Laughery Turnpike Company *vs.* Holthouse, 7 Ind., 59, 61, followed in Bowen *vs.* Striker, 100 Ind., 45, the court held that "statutes are to be construed prospectively, unless the intention to give retrospective operation is clearly expressed, *and not even then, if by such a construction the act would divest vested rights.*"

The Court of Appeals in the instant cases held that the act in controversy is not retroactive; that the intention of Congress in enacting section 7 was to preserve, not to destroy, vested interests; to recognize, and not to abridge the rights of the respondents. We submit that in this the Court of Appeals was right and followed the judicial principles established by the cases above cited. The contrary construction, by which a burden would be imposed annually upon those who have kept faith with the District, paid all that was de-

manded for their privileges, and expended large sums of money to enjoy them, is unnecessary. To hold that the act is prospective only in its operation, if it be valid at all, is to permit the exaction, by way of rental, of compensation for the use of vaults hereafter constructed under contracts embodying the rental provision; leaving in *statu quo* those who have already, under a solemn agreement, paid for such use *all* that was required, relying on the terms of such agreement that what had been required *was* all.

For all the reasons hereinabove set forth, we respectfully submit that the judgments of the Court of Appeals should be affirmed.

Petitioner's Brief.

1. Counsel for petitioner apparently bases his entire argument upon the proposition that no contractual relation existed between the District of Columbia and the respondents. If he is wrong in his contention, then his whole argument fails. That respondents and the District did contract with reference to the vaults in question has been already argued and, we think, demonstrated. Nothing further need be said on this point except to invite attention to the language used in the permits and regulations relating to vaults, such as "It is further agreed, that," etc., in the permit; and in the regulations that the application for a permit must be accompanied by a "written agreement" signed by the owner, etc., "contracting to release and relinquish" the vault space and remove fixtures, etc., when such space should be needed for public uses (R., pp. 6, 7).

2. The question is also raised by petitioner's counsel, that the Commissioners had no power to make the contracts

claimed by the respondents. This question is disposed of by the fact that the building regulations have been determined to have the force of law, having been authorized by Congress (Berry *vs.* D. C., 32 App. D. C., 96), and by the act of Congress of March 3, 1891 (26 Stat., p. 868), which ratified the action of the Commissioners in theretofore granting permits for extensions beyond the building line and authorized them, with the concurrence of the Secretary of War, to grant future permits (R., p. 5). (The Secretary's concurrence was later dispensed with.)

3. To the argument made that no franchise, license, or easement of a perpetual nature as to vault space could be or was intended to be granted, it is a sufficient answer to observe that owners of properties, such as hotels, large stores, office buildings, and banking-houses, have not for a hundred years built, and do not build and equip for commercial purposes vault space beneath sidewalks at large expense, and as constructive parts of such edifices, with the expectation and understanding that the vaults are temporary, removable at the mere whim of the Commissioners, and not to be considered as of equal permanence with the buildings to which they are adjunct, except in so far as such vaults are removable for public purposes. The risk of such removal they are willing to take because remote and of rare occurrence.

An illustration of this is the occupancy by respondent Saks & Company for over 30 years of the vaults adjacent to their leased property.

The cases cited in petitioner's brief do not seem in point, as they deal either with the attempted grant of *exclusive franchises* in the streets of a city, or with rights claimed in

contravention to those of the public. No such situation is presented in the cases at bar.

One State case, however, is quoted from at some length, concerning which a few words may be said. It is the case of Tacoma Safety Dep. Co. *vs.* Chicago, 247 Ill., 192; 31 L. R. A. (N. S.), 868. The enforcement of an ordinance requiring rental for vault space under a sidewalk, the fee of which was in the city of Chicago, was sought to be enjoined on the ground that because the city granted a permit to the company to construct its building according to plans which included subways beneath the sidewalks, the city was estopped to deny the company's right to use the subways free of charge. The court held that the mere granting of the permit to erect the whole building, including the space beneath the sidewalk, the city having a right to regulate the construction of the building, did not constitute a contract nor prevent the city from compelling payment of compensation for the use of its property. The court, however, distinguished the cases theretofore decided by it, recognizing the power of the city to contract with respect to subsidewalk space, and the binding force of such contracts upon the city. The case therefore is not applicable to the facts presented by the records now before this court.

4. The petitioner's brief concludes with the naive suggestion that the "licenses" for the vaults used by respondents might be revoked, and new licenses issued carrying rentals under the act of September 1, 1916, and such proceedings "concededly" would be regular, and, of course, a like action might be taken with respect to *all* vaults built prior to the date of the act.

We do not concede the regularity of any such procedure, but, on the contrary, invite attention to the fact that *only* the need of the vault spaces for *public uses* would justify the revocation of the many vault permits issued during a period of over one hundred years preceding the passage of the Vault Rent act; a fact not only embodied in the permits and contracts under which such vaults were built, but recognized by the uniform conduct of the municipality for more than a century.

In conclusion, we submit that the vaults in question were constructed under contracts with the District, and that these contracts were necessarily and in express terms subject to the paramount rights of the public and the exercise by the Congress of the police power inherent in its exclusive legislative jurisdiction over the District; but that such contracts were *not* subject to any reserved power in Congress to impair or change at will the obligations of the District contained therein, especially as to the charge stipulated for the use of the vaults, such charge having been fixed by the District itself. In other words, having the power to exact any compensation it desired, the District elected by its contracts to make no charge other than the permit fees, and thereby exhausted its right to exact compensation as to those vaults which were the subject of such contracts.

Respectfully submitted,

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(3493)

DISTRICT OF COLUMBIA *v.* R. P. ANDREWS PAPER COMPANY.

DISTRICT OF COLUMBIA *v.* SAKS & COMPANY.

DISTRICT OF COLUMBIA *v.* LISNER.

CERTIORARI TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

Nos. 282-284. Argued April 22, 25, 1921.—Decided June 1, 1921.

1. Permits to build vaults under sidewalks adjacent to their premises were issued to private parties for a nominal charge by the Commissioners of the District of Columbia, subject to the building regulations, which provided, *inter alia*, that no charge should be made the occupants of such vaults, that permits should be revocable when the space was needed for public use or improvements, and that the space should be vacated when ordered by the Commissioners or needed for public use; the permittees signed agreements, as required by these regulations, accepting the permits on conditions recognizing the right of the District to construct sewers, etc., which it might deem necessary, and the duty of vault occupants to clear the space

therefor, without cost to the District, and declaring that the occupation was permitted merely as an accommodation to abutting owners, and that no right, title or interest of the public was in any way waived or abridged, "except as expressed in said permit and the conditions aforesaid." *Held*, that the building regulations were not to be looked to for grants in the streets, and that the permits were to be strictly construed and were mere licenses, revocable by the District Government at its discretion. P. 586.

2. An application made long ago to the District Government for permission to build a vault under a sidewalk, followed by its construction and continuous use, may support a presumption of a license but not of a permanent grant in the street. P. 587.

3. The Act of September 1, 1916, c. 433, § 7, 39 Stat. 716, authorizing and directing assessment and collection of rent from all users of space under sidewalks and streets of the District of Columbia, occupied and used in connection with their business, applies to vaults constructed before as well as those constructed after the date of the act. P. 588.

49 App. D. C. 273, 276; 263 Fed. Rep. 1017, 1020, reversed.

THE cases are stated in the opinion.

Mr. F. H. Stephens for petitioner.

Mr. M. D. Rosenberg and *Mr. Charles L. Frailey*, with whom *Mr. E. H. Jackson* was on the brief, for respondents.

MR. JUSTICE CLARKE delivered the opinion of the court.

These three cases, tried on agreed statements of fact, were argued and will be disposed of together.

The respondents were assessed a rental upon vaults under sidewalks which were used in connection with business conducted in adjacent buildings. They refused to pay the assessments, and, in these suits to collect them, judgments were rendered by the Supreme Court in favor of the District, which were reversed by the Court of Appeals on the ground that the act of Congress authorizing the assessments was applicable only to constructions permitted after its date.

The essential facts are as follows:

The appropriation act for the District of Columbia, approved September 1, 1916, c. 433, § 7, 39 Stat. 676, 716, provided:

"That hereafter the Commissioners of the District of Columbia are authorized and directed to assess and collect rent from all users of space occupied under the sidewalks and streets in the District of Columbia, which said space is occupied or used in connection with the business of said users."

Pursuant to this authority, the Commissioners caused the space occupied by vaults of each of the three respondents to be valued and then assessed against each of them a rental which it is stipulated is "fair and reasonable" in amount "if it be a legal charge."

The permits involved in the Paper Company and Lisner cases were issued before the act complained of was passed and these two cases will be first considered.

The essential provisions of each of these permits are: "This is to certify that . . . , has permission to build vault . . . as per plan . . . in accordance with application . . . on file in this office, and subject to the provisions of the Building Regulations of the District of Columbia." There is nothing in either permit in the nature of a grant or which enlarges the permission beyond the terms quoted.

When these permits were issued, the Building Regulations provided (paragraph 9):

"No charge will be made for the occupancy of public space by vaults or areas, except the usual permit fee, and all permits for such occupancy are subject to revocation by the Commissioners at any time without compensation, when the vault space is needed for public use or improvements. . . . And this permit is accepted with the understanding that the occupation of the vault space is permitted merely as an accommodation to the owner of

the abutting premises and that no right, title or interest of the public is in any way waived or abridged thereby, except as expressed in said permit and the conditions aforesaid." Then follows an agreement by the licensee to use the vault only for the purposes authorized by the Commissioners.

And paragraph 3 provided:

"The application for a vault must be accompanied by a written agreement, upon an official blank, signed by the owner of the abutting property, . . . contracting to release and relinquish the vault space and to remove, free of expense to the District, all machinery, fixtures, or structural parts of the vault when so ordered by the Commissioners, or needed for public uses." The only charge made by the District was one dollar for the permit to construct.

Pursuant to paragraph 3, *supra*, the applicants each signed an agreement in precisely the same form, accepting the permit on condition (1) that the District shall have the right to construct under, over or through the vault public sewers or other underground construction which it may deem necessary, without compensation; and (2) that upon notice from the District of a desire to place any such construction in the area occupied by the vault, space clear and sufficient for it shall forthwith be made therein (by the acceptor) "without cost to the District." The acceptance concludes, "This permit is accepted with the understanding that the occupation of the vault space is permitted merely as an accommodation to the owner of the abutting premises, and that no right, title or interest of the public is in any way waived or abridged thereby, except as expressed in said permit and the conditions aforesaid."

The respondents, the R. P. Andrews Paper Company and Abraham Lisner, defended against the collection of the assessments, claiming that their permits to construct

were in such form as to create in each by contract a vested right of property in the vault in the street, of which they would be deprived without due process of law if they were required to pay the rental.

To sustain this position, the respondents select from paragraph 9 of the Building Regulations, *supra*, the provision that "no charge shall be made for the occupancy of public space by vaults," and that all permits are subject to revocation "when the vault space is needed for public use or improvements." From paragraph 3, *supra*, they select the stipulation that the vault space shall be vacated when ordered by the Commissioners "or needed for public uses," and from the terms of the acceptances of the permits the provision, that the Commissioners may place in the vaults any construction they may "deem necessary." Grouping these unrelated excerpts together it is contended that they constitute a contract on the part of the District to leave the respondents in the undisturbed possession of the vaults, free of charge, until such time as the space may be demanded because needed for some public use and improvement, and that since the act of Congress under which the disputed rental is imposed is purely a revenue measure which does not require the surrender of the space for any public use, but contemplates the continued private use of it, it is an invalid attempt to deprive the respondents of their property without due process of law.

This statement of the contention of the respondents is its own sufficient refutation.

In form the permit is a mere naked permission to build. Two of the three clauses relied upon to create rights of property in the streets are derived from the Building Regulations, which, as their name implies, are designed to regulate the materials of buildings and the manner of their construction and use,—they are not looked to, on such a mere reference as we have here, for a grant of rights

in streets,—and the third clause is from the acceptances of the permits, which are signed only by the applicants. When to this we add that, the applications culminated and ended in acceptances of the permits "with the understanding that the occupation of the vault space is permitted merely as an accommodation to the owner of the abutting premises and that no right, title or interest of the public is in any way waived or abridged thereby, except as expressed in said permit and the conditions [in the acceptances] aforesaid," and that the settled rule of law is that the grants of rights and privileges in streets are strictly construed so that whatever is not unequivocally granted therein is withheld, and that nothing passes in such case by implication, (*Knoxville Water Co.* v. *Knoxville*, 200 U. S. 22; *Blair* v. *Chicago*, 201 U. S. 400, 471; *Piedmont Power & Light Co.* v. *Graham*, 253 U. S. 193, 194) we cannot doubt that the permits to the respondents were mere licenses, subject to revocation at any time in the discretion of the Government of the District.

The Saks & Company case, No. 283, is, if possible, even less substantial than the other two. Whatever rights in the streets this respondent has must be derived from the application made in 1884 for a permit to erect a building with adjacent vaults, and from the presumption of a permit, arising from the fact that a vault was constructed and has been in use ever since. No formal permit appears in the record.

A license to Saks & Company to construct and use the vaults, revocable at will, would be sufficient to render them lawful constructions in the street until the privilege should be revoked, and this is all that can fairly be inferred against the public from the facts stated. Without a permit presumed the vault would be a public nuisance, but no grant of a permanent right in the street can be inferred from a mere application and use.

The Court of Appeals gives much greater significance

to the concluding words of the acceptances in permits in Nos. 282 and 284 "except as expressed in said permit and the conditions aforesaid," than we can find in them. There are certainly no limitations upon the rights of the public in the permit itself, and the conditions of acceptance here referred to were special agreements, in the acceptances, on the part of the applicants to surrender the vault space upon demand of the Commissioners for special purposes and to an extent designated, which we think not inconsistent with the larger declaration with which the permit was accepted, that the occupation of the vault was a mere accommodation to the receiver of the permit and did not constitute any waiver of any right, title or interest of the public in the streets.

Concluding, as we do, that the respondents were mere licensees, we see no reason for limiting the act of Congress, as the Court of Appeals limited it, to constructions after the date of the act. Such an interpretation of the act would so obviously result in unjust inequality that it should be adopted only under stress of imperative language which we do not find in it.

It results that the judgment of the Court of Appeals of the District will be reversed and that of the Supreme Court affirmed in each of the cases.

Reversed.